



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 181 OF 2018**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI, PROHIBITION AND A DECLARATION**

**AND**

**IN THE MATTER OF SECTIONS 4(2)(F), 6(1) AND 175 OF THE  
PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT**

**AND**

**IN THE MATTER OF PART III OF THE FAIR ADMINISTRATIVE ACT**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF AN AGREEMENT BETWEEN THE GOVERNMENT OF KENYA**

**AND THE NORDIC DEVELOPMENT FUND FOR FINANCING OF**

**THE KENYA ELECTRICITY EXPANSION PROJECT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**ASTONEFIELD SOLESA SOLAR KENYA LTD/ CLEARWATER**

**INDUSTRIES LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**SHENZHEN CLOU ELECTRONICS CO. LTD.....2<sup>ND</sup> INTERESTED PARTY**

JUDGMENT

Introduction

1. The Government of Kenya and the Nordic Development Fund entered into a grant agreement dated 6<sup>th</sup> October, 2012 for Off-grid Energy Supply Using Wind and Solar Energy under the World Bank's Electricity Expansion Project. The Kenya Power and Lighting Company, which is a statutory Corporation and the *ex parte* Applicant herein (hereinafter "the Applicant"), was named the implementing agency in the said agreement. On 18<sup>th</sup> April 2017, the said Applicant floated via an advertisement an invitation to tender in respect of Tender No. KP1/6D.4/PT/1/17 for the procurement of Plant Supply, Installation and Commissioning of 550 KW Solar Plant – Kenya Electricity Expansion Project (KEEP).
2. The Applicant opened the tenders in the presence of all bidders, and upon evaluation of the tenders, awarded the contract to Shenzhen Clou Electronics Co. Limited, the 2<sup>nd</sup> Interested Party herein, via a letter dated 13<sup>th</sup> March 2018. Astonfield Solesa Solar Kenya Ltd/Clearwater Industries Limited, a joint venture of two companies and the 1<sup>st</sup> Interested Party herein who was one of the other bidders, thereupon challenged the decision of the Applicant by way of Request for Review Application No 42 of 2018, which was filed on 29<sup>th</sup> March 2018 with the Public Procurement Administrative Review Board, the Respondent herein. The Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes.
3. On 19<sup>th</sup> April 2018, the Respondent delivered its decision on the said Request for Review and made the following orders:
  - a) **The request for review dated 28<sup>th</sup> March 2018 and filed by the Applicant, Messrs Astoufield Solea Solar Kenya Ltd/Clearwater Industries Limited (hereinafter, "the Applicant") on the 29<sup>th</sup> March 2018 in the matter of Tender No. KPI/6D.4/PT/1/17 for the procurement of plant, supply, Installation and commissioning of 550KV Solar Plant at the Lodwar Power Station – Kenya Electricity Expansion Project (KEEP), be and is hereby allowed.**
  - b) **The award of the subject tender to the successful bidder, M/s Shenzhen Clou Electronics Co. Limited, be and is hereby annulled and set aside.**
  - c) **The Procuring Entity is directed to re-evaluate afresh the bids for financial bids submitted to it taking into account the findings of the Board herein and complete the procurement process including the making of an award within 14 days from the date of this decision.**
  - d) **In view of the nature of the orders issued above and in further view of the fact that the Applicant and the other bidders who participated in this procurement process will have a second opportunity to participate in the fresh financial re-evaluation participated in this procurement process will have a second opportunity to participate in the fresh financial re-evaluation process ordered, the Board orders that of each party shall bear its own costs of this request for review.**
4. The Applicant, being aggrieved with the Respondent's decision, then filed the instant judicial review proceedings by way of a Notice of Motion Application dated 13<sup>th</sup> August 2018, and is seeking the following orders:
  - a) **An order of Certiorari to remove to this Court for purposes of being quashed, the Respondent's entire decision delivered on 19<sup>th</sup> April, 2018 in Request for Review No. 98 of 2018.**
  - b) **An order of Prohibition to prohibit and/or restrain the Respondent from entertaining any other and/or further administrative review touching on procurement of Plant Supply, Installation and Commissioning of 550 KW Solar Plant-Kenya Electricity Expansion Project (KEEP) (ICB No. KPI/6D.4/PT/1/17)**
  - c) **A declaration be issued that pursuant to Section 4(2) of the Public Procurement and Assets Disposal Act, procurement and disposal of assets under bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency, in which the Respondent is an implementing agency, are not procurements or asset disposal with respect to which the Act applies.**
  - d) **The Ex-parte Applicant be awarded costs.**
5. The application is supported by the grounds on its face, further grounds set out in the Statutory Statement dated 3<sup>rd</sup> May 2018, and a Verifying Affidavit sworn on the same date by Justus Ododa, the Applicant's Legal Assistant. The Respondent opposed the application through a replying affidavit sworn on on 3<sup>rd</sup> June, 2018 by its Secretary, Henock K.Kirungu. The 1<sup>st</sup> Interested Party also opposed the application by filing a Replying Affidavit sworn on 25<sup>th</sup> September, 2018 by its Director, Abdi Dara and filed in court on the same date. The 2<sup>nd</sup> Interested Party on its part filed an affidavit in support of the application sworn on 18<sup>th</sup> June, 2018 by Zhao Yupeng, its local representative, and filed in court on 19<sup>th</sup> June, 2018.
6. The Court directed the parties to canvass the application by way of written submissions, which were duly filed, and orally highlighted during the hearing of the application. The parties' respective cases from their pleadings and submissions now follow.

## The Applicant's Case

7. It is the Applicant's case that Tender No. KPI/6D.4/PT/1/17 for the Procurement of Plant Supply, Installation and Commissioning of 550KW Solar Plant-Kenya Electricity Expansion Project (KEEP) (hereinafter Tender No. KPI/6D.4/PT/1/17) arose out of the aforesaid agreement between the Government of Kenya and the Nordic Development Fund. Further, that the procurement process followed in the said Tender was in accordance with the method expressly disclosed in the Specific Procurement Notice (SPN) dated 18<sup>th</sup> April, 2017 which stated that the International Competitive Bidding (ICB) method with "Single Stage" Bidding Procedures would be followed in accordance with the World Bank's Rules and Procedures for Procurement of Goods and Work, which is a publicly available document accessible to all bidders. As such, the subject matter falls under Section 4 (2) (f) and 6(1) of the Act.

8. The Applicant therefore averred that the Respondent lacked jurisdiction to entertain the Request for Review by the 1<sup>st</sup> Interested Party, being Request for Review No. 42 of 2018. They further stated that the 1<sup>st</sup> Interested Party's claim was time barred as the breach complained of related to events which took place at the time the tender documents were made available to the public, which was a period of about one year before. According to the Applicant, the Respondent further acted in excess of its jurisdiction in disregarding the terms of the terms of the Bidding Document and purported to amend the Bid Document and rely on "what the Bidding Document should have provided for."

9. Accordingly, that the Respondent equally failed to consider relevant factors including the sound public policy underlying the enactment of Section 4(2) (f) of the Act including the recognition against imposing Kenya's own procurement laws on another government or foreign agency. Lastly, the 1<sup>st</sup> Interested Party's Request for Review was incurably defective for failing to name the successful bidder as a party in the proceedings which is contrary to the right to fair hearing and due process. In a nutshell, the Respondent entertained a matter which lay outside the scope of powers conferred upon it by law, hence its resultant decision was *ultra vires*.

10. Mr. Otachi, who appeared for the Applicant, submitted that judicial review principles and parameters have evolved over time as was recognized by the Court of Appeal (Koome, Sichale & Otieno-Odek, JJ.A) in **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others, (2016) e KLR**. Similarly, that the same court (Waki, Nambuye & M'inoti, JJ.A.) in **Child Welfare Society of Kenya vs Republic & 2 Others Ex-parte Child in family Focus Kenya (2017) eKLR** reiterated with approval the holding that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. Counsel also relied on the Court of Appeal (Maraga, Musinga & Gatembu, JJ.A.) decision of **Josephat Kiplagat vs Michael Bartenge (2016) eKLR** to argue that section 11 of the Fair Administrative Action Act has widened the scope of orders that a court may grant in judicial review matters.

11. He further submitted that the core issue in the suit herein is that of jurisdiction, and relied on the *locus classicus* case of **The Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited, (1989) KLR** where Nyarangi J stated that; "*jurisdiction is everything, without it, a court has no power to make one more step.*" He also relied on the case of **Yusuf Gitau Abdalla vs Building Centre (K) Ltd & 4 Others, (2014) eKLR** where the Supreme Court reiterated that jurisdiction cannot be assumed by craft nor will it be conferred by way of a party's pestering. Also, counsel relied on the case of **Consolidated Bank of Kenya Limited vs Arch Kamau Njendu t/a Gitutho Associates (2015) eKLR** where the court approved the pronouncement by Justice Akpata in **State vs Ollagoruwa (1992) C.S.C.D 17 at 19** that when a court lacks jurisdiction and continues to hear and determine judicial proceedings, it builds on quick sand and all proceedings and steps taken on it will not stand.

12. The first limb of the Applicant's submissions on jurisdiction was in reliance on section 4 (2)(f) and 6(1) of the Public Procurement and Assets Disposal Act, 2015 (hereinafter referred to as "the Act"), to argue that the subject procurement is under a bilateral agreement between the Republic of Kenya and Nordic Development Fund, with the Applicant brought in as the implementing agency. Therefore, that the Applicant was only used to enforce the agreement, and thus exempted under the provisions of Section 4(2)(f) and 6(1) of the Act. Further, that it was for this reason that the procurement process which followed was conducted under the International Competitive Bidding (ICB) method with "single stage" bidding procedure followed, and governed in accordance with the World Bank Rules and Procedures for Procurement of Goods and Works as set out in the agreement.

13. As such, the Respondent being a creature of statute could only exercise its jurisdiction to the extent set out in section 28 as read with section 167 of the Public Procurement and Assets Disposal Act. It follows then that the Respondent's decision is *ultra vires* as the entire proceedings were undertaken without jurisdiction. The Applicant sought to distinguish two decisions of the High Court relied on by the Respondent in its determination that is, **Republic vs Public Procurement Administrative Review Board & Another Ex parte: Athi Water Service Board & Another (2017) eKLR** where the court appreciated the rationale behind sections 4(2)(f) and 6(1) that is, to avoid the imposition of Kenyan law on an international entity or government. A similar position was held by the same judge in **Republic vs Public Procurement Administrative Review Board Ex-parte Geothermal Development Company Limited & Another (2017) eKLR**. However, they submitted that the above decision were given *per incuriam* as the court failed to notice that section 4 (2) (f) of the Act refers to, "procurement and disposal under bilateral or multilateral agreements."

14. The Applicant further submitted therefore that the issue at hand was whether Section 6(1) applies to the tender to the extent that there is or there may be conflict between the provisions of the Act and the terms and conditions of the financier's terms, which terms and conditions supersede the provisions of the Act. In that regard, they relied on the decision of **Okiya Omtatah Okoiti & Anor -vs- Attorney General & 3 Others (2014) eKLR** where the court held that Public Procurement and Assets Disposal Act, 2015 does not apply to Government to Government Procurement.

15. Additionally, that the Respondent failed to consider the sound policy underlying the enactment of Section 4(2) (f) of the Act, including the recognition against imposing Kenya's own procurement laws on another Government and foreign agencies, thereby arriving at an unlawful decision. Counsel relied on the case of **Zachariah Wagonza & Anor vs Office of the Registrar Academic Kenyatta University & 2 Others (2013) eKLR** and **Kenya Revenue Authority vs Web Fotaine Group FZ-Lic & 2 Others (2017) eKLR** to support his argument.

16. It was the Applicant's submission in this regard that public interest should always come first, and the Respondent's insistence that the

Applicant ignores express provisions of the tender documents puts the grant at risk of withdrawal. Reliance was placed on the Court of Appeal decision (R.N Nambuye, M. K. Koome, J. Otieno-Odek, JJ.A) in the case of **Kenya Hotel Properties Limited vs Willisden Investment Limited & 6 Others, (2013) eKLR** and the decisions in **Kenya National Examination Council vs R ex p. Kemunto Regina Ouru Nairobi Civil Appeal No. 127 of 2009** and **Kenya Power & Lighting Co. vs NMG Limited & 2 Others, Nairobi Civil Application No. 27 of 2010**, for the position that public interest overrides private individuals' interest.

17. The second limb of the Applicant's submission on jurisdiction was that the Respondent entertained the 1<sup>st</sup> Interested Party's Request for Review which was filed outside fourteen days of occurrence of the alleged breach, contrary to Section 167(1) of the Public Procurement and Assets Disposal Act. Counsel submitted that the 1<sup>st</sup> Interested Party's claim was time barred as the breach complained of related to events which took place at the time the tender documents were made available to the public, which was a period of about one year before.

18. To buttress its argument, the Applicant relied on the case of **Republic v Public Procurement Administrative Review Board ex-parte Kenya Power and Lighting Company & Anor (2017) eKLR** where it was held that unless the court finds that the timelines provided in a statute is unlawful or is not mandatory but simply directory, the failure to comply therewith renders the decision unlawful. Similarly, the consequence of such a decision was explained by the Court of Appeal found in **Josephat Kiplagat vs Michael Bartenge (supra)** that is, where a decision is arrived at contrary to statutory provisions or without jurisdiction, an order of certiorari would issue to quash the decision.

19. The third limb of the submissions on jurisdiction by the Applicant was that in an attempt to arrogate itself jurisdiction, the Respondent purported to create a new cause of action relating to evaluation. It was urged in this respect that the Respondent acted *ultra vires* by introducing preference criteria which was conspicuously missing from the bid documents, thereby amending the tender document through its decision. In that regard, they relied on the case **JGH Marine A/S Western Marine Services Limited CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs Public Procurement Administrative Review Board & 2 Others, (2015) eKLR**, where the court held that when the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction.

20. The case of **Republic vs Public Procurement Administrative Review Board & 2 Others ex-parte Numerical Machining Complex Limited, (2016) eKLR** was also cited by the Applicant, wherein the court held that powers of the Respondent can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally. In addition, that a similar position was taken in the case of **Republic vs Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunications PVT, (2014) eKLR**.

21. Lastly, the Applicant submitted that the Respondent made an error on the face of the record to entertain an incurably defective Request for Review which did not enjoin the winning bidder as party in the proceeding, contrary to the provisions of Section 170 the Act, the right to a fair hearing and due process. Such an omission, according to counsel, crippled the entire process irredeemably rendering it incompetent. It was his submission that entertaining such a request for review notwithstanding the provisions of Section 170 of the Act was clear error of law amounting to illegality as defined in **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300**.

22. In conclusion, the Applicant relied on the holding of **Macfoy -vs- United Africa C. Limited, (1961) 3All ER 1169** where the court stated that if an act is void then it is in law a nullity, and submitted that this holding was buttressed by the holding in **Anisminic Ltd -vs- Foreign Compensation Commission (1969) 1 All ER 208** on the instances when a decision will be a nullity.

### **The Respondent's Case**

23. The Respondent confirmed that Tender No. KP1/6d.4/PT/1/17 was advertised in the local newspapers and the Applicant's website on 18<sup>th</sup> April, 2017, and that twenty six bidders submitted their bids by the deadline of Tuesday 18<sup>th</sup> July, 2017 at 10 am. Further, that the bids were opened on 18<sup>th</sup> July, 2017 at the Applicant's offices auditorium in the presence of representatives from the bidders and Applicant, and subject to the conclusion of the evaluation process, it was concluded that M/S Shenzen Clou Electronic Co. Ltd, the 2<sup>nd</sup> Interested Party herein was the lowest evaluated bidder. However, that after the award of the tender, a Request for Review was lodged before the Respondent Board by the 1<sup>st</sup> Interested Party.

24. It was the Respondent's case that after hearing the parties, and after due consideration of all the material adduced before it and the applicable law and principles, it reached a considered determination of the issues. The Respondent contended that it acted within its jurisdiction and reasonably, and denied that there were any errors on the face of the record, or that it failed to consider any relevant factors or considered irrelevant factors.

25. Mr. Munene Wanjohi, the counsel for the Respondent, relied on his written submissions and contended that the issue of jurisdiction was raised by the Applicant on the ground that the project which was subject matter of the request for review was being funded by donors. The counsel urged that the main issue that the court needed to address is whether the mere fact that the particular procurement taken using the proceeds of a grant or loan where the Government of Kenya is a party, can oust the jurisdiction of the board to hear and determine a dispute relating to the said procurement under the provisions of Section 4 (2) (f) of the Act and the provisions of the Constitution of Kenya.

26. Mr. Wanjohi argued in this regard that the issue has been determined by this court in several decisions which were binding on the Respondent. He cited the case of **Republic vs Public Administrative Board, Machiri Limited, Athi Water Services Board and Weihia International Economic & Technical Cooperation Company Limited (Nai HC Milimani Commercial Courts Misc. JR Application Nos. 402 & 405 (Consolidated) of 2016)**, where the court stated that the mere fact that a project is being financed by funds from a donor, cannot deprive the Respondent or the court of the oversight and supervisory jurisdiction to hear and determine the dispute pursuant to the provisions of Section 4(2) (f) of the Act.

27. Counsel also relied on the holding of Lenaola J. (as he then was) in the case of **of Okiya Omtata Okoiti & 2 Others vs The Attorney General & 3 Others (Petition No. 58 of 2014) eKLR** on the legality as regards similar provisions in the previous Procurement Act.

Accordingly, that the overriding consideration is whether the donor funds in question are to be paid back by the Kenyan public and if the answer is in the affirmative, then the institutions charged with the duty to provide oversight over use of such funds both under the Constitution and other laws are vested with the jurisdiction to provide such oversight.

28. On the issue whether there was an error on the face of the record, the Respondent submitted that by dint of section 170 of the Act, the law presumed certain legal persons as automatic parties to a request for review and in any event, it also has power to join necessary parties into the review proceedings before it that is, parties who are likely to be affected by the decision of proceedings. According to the Respondent, the law automatically deems the successful bidder as a party to the proceedings before it.

29. Further, that the Respondent has always taken the view that any bidder who has participated in the procurement process is entitled to participate in the proceedings pending before it as a matter of right. In any event, that the successful bidder was actually notified of the existence of the proceedings by virtue of the provisions of section 170(c) of the Act, and appeared before the board through Mr. Geoffrey Muchoki Advocate, who fully participated in the proceedings.

30. On the allegation that the Respondent acted *ultra vires*, Mr. Wanjohi submitted that owing to the significance and the public importance attached to the issue of preference and reservations set out under Part XXII of the Act running from sections 155 to 157, it was apparent that there was a clear legislative intent for promotion of local industry and economic empowerment processes of Kenyan citizens, by enhancing their ability to participate in procurement processes by cushioning them against skewed competition. Counsel further submitted that the procuring entity are under a legal duty to consider whether a bidder is entitled to preference or not, and thereafter must accord the bidder preference notwithstanding silence in the tender documents or any express provisions to the contrary in the tender documents.

31. In addition, that section 155 of the Act stipulates that pursuant to Article 227(2) of the Constitution and despite any other provision of the Act or any other legislation, all procuring entities shall comply with the law on preference and reservations. Section 158 sets out the margin of exclusive preference while section 157 (9) promotes sustainability of the local industry. Counsel submitted that although the tender document did not have a mandatory requirement requiring the procuring entity to apply the preference and reservation scheme, that based on the law and precedent, preference ought to have been awarded to the 1<sup>st</sup> Interested Party and any other bidders who were entitled to it.

32. To buttress this argument, counsel relied on the cases of **Republic vs The Public Procurement and Administrative Review Board and the Kenya Revenue Authority**, NAI HC Constitutional and Judicial Review Misc. application No. 540 of 2008 and **Republic vs The Public Procurement and Administrative Board, National Training authority and Coretech Solutions and Systems Ltd** NAI Misc. Appl. No. 334 of 2015.

33. In conclusion, the Respondent submitted that if any such bilateral agreement purports or purported to take away the right of preference and reservation, then the same would be contrary to the letter and spirit of the law. As such, the procuring entity acted contrary to the law by failing to consider and accord preference to the Applicant, and any other bidder who were entitled to the application of such scheme in its favour in the procurement. They therefore urged the court to dismiss the application.

### **The 1<sup>st</sup> Interested Party's Case**

34. The 1<sup>st</sup> Interested Party contended that the Applicant failed to adduce sufficient evidence to show that the procurement which is the subject matter of these proceedings is a procurement to which the Public Procurement and Asset Disposal Act does not apply as provided by section 4(2) (f) of the Act. Further, that their Request for Review was not time barred, as the same was filed by the 1<sup>st</sup> Interested Party within fourteen (14) days of the notification of the award as provided for in section 167(1) of the Act. Accordingly, the tenderer notified as successful by the procurement entity is by law a party to the review pursuant to Section 170(c) of the Act, and the non-inclusion of the name of the 2<sup>nd</sup> Interested Party was not fatal to the review, as they were served and took part in the proceedings.

35. Mr. Owino, the counsel for the 1<sup>st</sup> Interested Party, submitted that procurement and disposal of assets under a bilateral or multilateral agreement between the Government of Kenya and any other foreign entity ousting the jurisdiction of the Respondent pursuant to Section 4(2) (f) is not fair, equitable, transparent, competitive and cost-effective, hence unconstitutional because it does not meet the constitutional thresholds stipulated under Article 227 of the Constitution.

36. He argued that the court has had occasions to consider Section 4 (2) (f) of the Act and whereas it fell short of declaring the same unconstitutional, it held that it is only in exceptional circumstances that such a provision should be interpreted in a manner that excludes public scrutiny, since Article 227 of the Constitution embraces all instances where a state organ or any other public entity is contracting goods or services. The decisions in **Republic vs Public Procurement Administrative Review Board & Another Ex-parte Geothermal Development Company Limited & Anor**, (2017) eKLR and **Republic vs Public Procurement Administrative Review Board & Anor Ex-parte Athi Water Services Board & Anor**, (2017) eKLR were cited in this regard.

37. Further, counsel submitted that the agreement which is the subject matter of these proceedings is a grant agreement, however, that the Applicant has failed to demonstrate that the said grant agreement is connected with the procurement that was undertaken by the Applicant. It was therefore their position that the procurement agreement in respect of procurement of a plant, supply, installation and commissioning of 55kW Solar Plant at Lodwar Power Station was yet to be entered into, and the Applicant is not the implementing agency in respect of the intended procurement agreement but the procuring entity. It therefore follows that the said grant is not a procurement agreement within the meaning of Section 4 (2) (f) of the Act and the applicant cannot use the said grant to escape scrutiny under the provisions of the Act.

38. On whether the Respondent acted *ultra vires*, counsel relied on Section 155 of the Act(1) to argue that tender documents that do not provide for preferences and reservations runs afoul of Part XII of the Act and even Section 80(2) would not aid such tender documents. The importance of taking into account the margin preferences as provided in law (Part XII Section 155 to 157 previously section 39(8) and Regulation 28(2) Public Procurement and Disposal Regulations, 2006) was clearly elaborated in the case of **Republic vs Public Procurement Administrative Review Board & Anor Ex-parte Athi Water Services Board & Anor** (*supra*).

39. According to counsel, the Applicant's justification for not including preferences and reservations since it was a donor's condition for availing funds for the procurement does not hold water, since firstly, Part XII has constitutional underpinning and contravening provisions under the said part would be in violation of the Constitution. Secondly, that the donor conditions have not been demonstrated to apply to the procurement the subject matter of these proceedings. Thirdly, that there is nowhere in the grant agreement that the bidding procedure to be followed is to be "in accordance with the World Bank's Rules and Procedures for Procurement of Goods and Works."

40. Counsel further submitted that whether or not the Request for Review was filed out of time is a matter of construction and interpretation of section 167(1) of the Act, however, they did not agree with the Applicant's position that the review was filed out of time. On the issue of whether the Request for Review was incurably defective for failing to name the successful bidder, the 1<sup>st</sup> Interested Party submitted that the provisions of section 170 of the Act illustrates the persons deemed to be parties to review whether or not they are named, and they are parties to the review proceedings once served or notified as was done in this case. In conclusion therefore, the 1<sup>st</sup> Interested Party argued that the Request for Review was properly before the Respondent, and urged the court to dismiss the application.

### **The 2<sup>nd</sup> Interested Party's Case**

41. The 2<sup>nd</sup> Interested Party contended that the Applicant advertised an invitation to tender in respect of the Tender No. KP1/6D.4/PT/1/17, and that it submitted its tender documents together with the requisite documents on 18<sup>th</sup> July, 2017. Further, that upon evaluation of the tenders, the Respondent ranked the 2<sup>nd</sup> Interested Party as the winner of the tender at a contract price USD 1,513,057.79 and Kshs.15,155,260/-, and subsequently communicated the award via a letter dated 13<sup>th</sup> March, 2018.

42. The 2<sup>nd</sup> Interested Party further averred that the Applicant required it to furnish a performance security in the amount of USD 151,305.78 and Kshs. 1,515,526/-, and it proceeded to obtain the performance security which it continues to service. It was the 2<sup>nd</sup> Interested Party's contention that it was on the strength of the award letter that the 2<sup>nd</sup> Interested Party made financial commitments and representations to third parties with regard to execution of the tender.

43. Mr. Muchoki, the counsel for the 2<sup>nd</sup> Interested Party, submitted that a litigant who approaches court must be clear on the jurisdiction they want to invoke. He therefore relied on the cases of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others (2012) e KLR** and **The Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited (supra)**, together with Section 4(2) (f) of the Act, to argue that the Respondent entertained a matter which lay outside the scope of powers conferred upon it by law. It was their submission that subjecting procurement under such a bilateral agreement to our legislation would imposing Kenya law on a multi-lateral agency, and such procurement can only be governed by the terms of the bilateral or multilateral agreement which agreements are subject to parliamentary scrutiny pursuant to Article 2(5) of the Constitution.

44. He further argued that it is clear from the grant agreement that the grant was to be utilized for the Kenya Electricity Expansion Project, and there was no intention that the funds would be repaid back to the Nordic Development Fund by the Government of Kenya. The decision in **Kenya Revenue Authority vs Web Fontaine Group FZ-Lic & 2 Others (2017) eKLR** was cited by the 2<sup>nd</sup> Interested Party for the position that there is need to keep distant the Public Procurement and Disposal Act 2005 (repealed) from procurements where public money is not utilized.

45. It was also contended that in the unlikely event that the Act would apply, then the Respondent entertained the request for review in breach of section 167 of the Act. According to the 2<sup>nd</sup> Interested Party, the breach complained of relates to events which took place over 13 months before at the time when the tender documents were published, and the Act is strict that the fourteen days start running from the date of occurrence of the alleged breach hence the 1<sup>st</sup> Interested Party's claim was time barred.

46. To buttress this argument, reliance was placed on the case of **Republic –vs- Public Procurement Administrative Board & 2 Others (2015) eKLR** for the position that if the 1<sup>st</sup> Interested Party was indeed aggrieved by the form and content of the tender documents, it would have raised the issue at a preliminary stage and not participated in the tender process to the end.

47. Lastly, the decision in **Macfoy –vs- United Africa Co. Ltd (supra)** was cited for the position that an act which is void is a nullity, and the 2<sup>nd</sup> Interested Party submitted that to this extent the Applicant's case was merited and ought to be allowed.

### **The Determination**

48. I have considered the pleadings, submissions and arguments made by the parties herein, and in this regard noted that while the Applicant in its prayers in the Notice of Motion referred a decision delivered on 19<sup>th</sup> April 2018 in Request for Review No 98 of 2018, its supporting grounds and submissions refer to the decision delivered on the same date in Request for Review No 42 of 2018, which is the decision the Applicant also annexed in support of its application. The Respondents, 1<sup>st</sup> Interested Party and 2<sup>nd</sup> Interested Party also all refer to the to the decision delivered on 19<sup>th</sup> April 2018 in Request for Review No 42 of 2018, and the Request for Review stated in the Notice of Motion was therefore clearly a typographical error, which is one that is amenable to correction by this Court pursuant to section 159 of the Constitution.

49. I therefore find that the issues arising for determination are firstly, whether the Respondent's jurisdiction to hear Request for Review No. 42 of 2018 was ousted by section 4(2)(f) and section 6 of the Public Procurement and Asset Disposal Act of 2015. If the Court finds for this issue in the negative, it will then proceed to consider the second substantive issue raised, namely, whether the Respondent acted *ultra vires* in making its decision on the said Request for Review on 19<sup>th</sup> April 2018. The last issue for determination will be whether the Applicant merits the prayers sought

50. On the issue of the ouster of the Respondent's jurisdiction, this Court is guided by the often cited decision of the Court of Appeal in

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”**

51. The source of the Respondent’s authority and jurisdiction is section 27 of the Public Procurement and Asset Disposal Act of 2015 (hereinafter “the Act”) which establishes the Respondent as an unincorporated Board, and its functions are set out in section 28 of the Act as follows:

**“1) The functions of the Review Board shall be—**

**(a) reviewing, hearing and determining tendering and asset disposal disputes; and**

**(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.**

**(2) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazette by the Cabinet Secretary.**

**(3) The Authority shall provide secretariat and administrative services to the Review Board.”**

52. Specifically on the Respondent’s jurisdiction as regards review of procurement processes, section 167(1) of the Public Procurement and Asset Disposal Act states as follows:-

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

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

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

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

**(a) the choice of a procurement method;**

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

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

53. The Applicant’s main argument is that these provisions on the Respondent’s jurisdiction do not apply in the present application, and are specifically ousted by virtue of sections 4(2)(f) and 6 of the Act. section 4 provides for the scope of application of the Act as follows:

**(1) This Act applies to all State organs and public entities with respect to—**

**(a) procurement planning;**

**(b) procurement processing;**

**(c) inventory and asset management;**

**(d) disposal of assets; and**

**(e) contract management.**

**(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—**

(a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;

(b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration; acquiring of services provided by government or government department;

(d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;

(e) procurement and disposal of assets under Public Private Partnership Act, 2013; and

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

(3) For greater certainty, all public procurement are procurements with respect to the application of this Act.

54. Section 6 of the Act on the other hand provides for the eventuality of a conflict between the Act and international treaties and agreements as follows:

(1) Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.

(2) Where the Republic of Kenya is required under the terms of any treaty or convention to which she is party, to contribute from her resources, in any form, to any procurement activities within Kenya, either in part or wholly, jointly or separately, procurement through such contributions shall be—

(a) in discrete activities where possible; and

(b) subject to the applicable provisions of this Act.

(3) The disposal of any or all of the goods or public assets accruing to Kenya as a result of procurement activities to which subsections (1) apply shall be subject to the provisions of this Act.

(4) Where a procurement to which subsection (1) applies favours an external beneficiary—

(a) the procurement through contributions made by Kenya, shall be undertaken in Kenya through contractors registered in Kenya; and

(b) all relevant insurances shall be placed with companies registered in Kenya and goods shall be transported in carriages registered in Kenya.

55. Section 4(2)(f) therefore specifically exempts the application of the Act, and therefore by extension excludes any action or review by the Respondent with respect to the specified procurements and disposal of assets specified therein. This is for the reason that the Respondent is not only a creature of the Act, but also its actions or reviews can only be validly undertaken pursuant to the jurisdiction and powers granted to it by provisions of the Act as shown in the foregoing. In addition, section 6 resolves any conflict between the Act and the terms of any treaty, agreement or convention to which the Government of Kenya is a party, by providing that the terms of the treaty and agreement shall supersede and apply, subject to the provisions of the Constitution.

56. This exemption is in line with the legal position that the enforcement of international agreements is governed by international law, and in particular the law relating to treaties, and even though many of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and are more likely to result in difficulties of interpretation and enforcement. The main purpose of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies

57. It is also expressly provided for by Article 2(5) and (6) of the Constitution that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. In addition, it was laid down in Re Queensland Mercantile and Agency Ltd (1892) 1 Ch 219 that judicial notice is taken of rules and principles of public international law, even when not embodied in municipal or domestic law. Black's Law Dictionary, Ninth Edition in this regard defines international law at page 892 as follows:

**“The legal system governing the relationships between nations, more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes)”**

58. The issue of the application of section 4(2)(f) and 6 to the procurement process for Tender No. KPI/6D.4/PT/1/17 was canvassed by

both the Applicant and 1<sup>st</sup> Interested Party during the hearing of the Request for Review No 42 of 2018. The Respondent stated as follows in its decision of 19<sup>th</sup> April 2018 as regards the arguments made in this regard by the 1<sup>st</sup> Interested Party's herein:

**“Turning to the objection that the Board does not have the jurisdiction to hear and determine the Request for Review under the provisions of Section 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act, Counsel for the Applicant argued that the two provisions of the Act are only applicable where the Government of Kenya is the Procuring Entity which was not the case in the dispute before the Board.**

He further argued that the Procuring Entity in this case was the Kenya Power & Lighting Company Ltd but not the Government and that the provisions of Sections 4(2)(f) and 6(1) of the Act were not therefore applicable to this case.

He further argued that the funds which were to be used in the procurement were public funds even though in the form of a grant and the procurement was therefore subject to the Constitution and the Act. He further argued that the bilateral agreement relied upon by the Procuring Entity did not talk of the procurement procedure to be used and therefore the applicable procedure was that provided for by the Act.”

59. The Respondent also summarised the arguments made by the Applicant herein as follows:

**“On the second ground of objection to the Board’s jurisdiction, Counsel for the Procuring Entity submitted that the provisions of Section 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act precluded the Board from hearing and determining the Request for Review. The basis for the said argument was that the procurement in question was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and the Nordic Development Fund and that the subject procurement would be undertaken using the World Bank Rules which would govern the procurement.**

Counsel for the Procuring Entity further submitted that the Government of Kenya would pursuant to the said agreement implement the project through the agency of the Ministry of Energy and the Kenya Power and Lighting Company Ltd.

Counsel for the Procuring Entity additionally stated that by virtue of the fact that the funds to be used in this procurement were donor funds, then the procurement was not subject to the jurisdiction of the Board under the provisions of Sections 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act and that the Board should therefore decline to exercise jurisdiction in this matter on that ground.

Counsel for the Procuring Entity further submitted that in view of the strict position taken by donors on the implementation of their procurement Regulations to be in procurement process where donor funds were used, any decision given by the Board in this matter would be futile and would be incapable of enforcement if it goes against the donor conditions and Regulations.”

60. The Respondent then proceeded to find as follows on the issue:

**“The third objection raised the Procuring Entity and which was also supported by counsel for the interested party was that the Board lacks the jurisdiction to hear and determine this request for review on the ground that the project which is the subject matter of the Request for Review is being funded through donor funds.**

Both parties relied on the provisions of Section 4(2)(f) and 6(1) of the Act. The board has considered the rival arguments made by all the parties regarding the above objection and wishes to commence the determination of this issue by setting out the provisions of Section 4(2)(f) and 6(1) of the Act which read as follows...

The main issue that the Board needs to therefore address is whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grant or a loan where the Government of Kenya is a party can oust the jurisdiction of the Board to hear and determine a dispute relating to the said procurement under the provisions of Section 4(2)(f) of the Act indeed under the provisions of the Kenyan Constitution.

The board wishes to state that this often vexed issue has been determined by the court in several decisions which are binding on the board.

One such decision is the case of *Republic –vs- Public Procurement Administrative Review Board, Machiri Limited, Athi Water Services Board and Weihia International Economic & Technical Cooperation Company Ltd (Nai HC Milimani Commercial Courts Misc. JR Application No’s 402 and 405 (Consolidated) of 2016*] where the High Court stated that the mere fact that a project is being financed by funds from a donor cannot deprive the Board or the court of the oversight and supervisory jurisdiction to hear and determine the dispute pursuant to the provisions of Section 4(2)(f) of the Act.

The court observed as follows in paragraphs 171 to 173 of the said decision which the Board has referred to severally in several previous decision and which it again finds necessary to reproduce hereunder for the avoidance of doubt in this and future cases that may come before it on this issue...

The court restated the same position in the case of *Republic –vs- The Public Procurement Administrative Review Board, Lex Oilfield Solutions Limited, Geothermal Development Company Limited & Netfast Communication Limited (Nai HC Misc. Application No’s 71 and 72 of 2017)*.

The legal position as regards similar provisions in the repealed Act was stated by the High Court in the case of *Okoya Omtatah Okoiti & 2 Others -v- Attorney General & 3 Others (Petition No. 58 of 2014 [2014] eKLR* where the Honourable Justice Isaac Lenaola who heard the Petition in the High Court stated as follows at page 27 of his said decision....

It is evident from all the above and other decisions on this issue that the overriding consideration when dealing with this issue is whether the donor funds in question are to be repaid back by the Kenya public at the end of the day and if the answer to such question is in the affirmative, then the institutions charged with the duty to provide oversight over the use of such funds both under the Constitution and other laws are vested with the jurisdiction to provide such an oversight.

Still on this issue, the Board has considered the Procuring Entity's contention that any decision given by the Board or indeed by the court's regarding a procurement where donor funds are to be used may be a decision in vain and may not be given effect.

The Board is with respect of a contrary opinion for the reason that the above fear is not based on any solid factual basis by way of illustration this Board has made decisions in several cases involving donor funds which have been complied with by donors one such decision being the case of *China Gezhbouba Group Co. Ltd -vs- Ministry of Water & Irrigation in Review No. 33 of 2017* among many others.

It is also clear in the Board's mind that donors who are an important and who play an extremely significant role in the economic development of this Country are entities which respect and would like to see the rule of law prevail. Donors also avail funds knowing that any procurement that may be undertaken using the said funds will be used prudently and that bidders who participate in such processes would be accorded an equal and a fair opportunity to participate in the procurement processes as envisaged by the provisions of various Articles of the Constitution, the Public Procurement and Asset Disposal Act and all the other laws that may be relevant to the issue. It is also clear in the Board's mind that no donor possibly has any favoured candidate in any procurement process and that is why the procurement processes/tenders are advertised to enable all those eligible members of the public participate.

The Board therefore finds the suggestion that donors may disregard the decisions of the Board and by extension the court as speculative and unfounded.

**This ground of objection to the Board's jurisdiction therefore also fails and is disallowed.**

61. It is notable that the determinant factor that was found relevant by the Respondent in assuming jurisdiction in this case was that the subject tender involved the use of donor funds which were to be repaid back by the Kenya public at the end of the day. It however did not engage in any determination of the nature of the ouster clause that was provided for by section 4(2)(f), and in particular abdicated its discretion and duty to make a finding as to whether the subject procurement process was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and a foreign international entity, which was what was in issue and was specifically raised and canvassed by the parties as shown in the foregoing.

62. This Court also notes that the Applicant in this regard annexed a copy of the agreement that was entered into between the Government of Kenya and the Nordic Development Fund that it relied upon. The agreement was annexed to a supplementary affidavit that it filed with the Respondent on 16<sup>th</sup> April 2018.

63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign government or agency, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the **Concise Oxford English Dictionary** is "as provided for by the rules of; or in accordance with". The plain and ordinary and meaning and contextual interpretation of section 4(2)(f) of the Act is therefore a procurement that is undertaken as provided for or in accordance with the terms a bilateral agreement that is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act.

64. It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2)(f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependant on a finding the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity. Further, the Respondent made an error in its interpretation of the provisions of section 4(2)(f) of the Act when it phrased the issue as follows:

**"The main issue that the Board needs to therefore address is whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grant or a loan where the Government of Kenya is a party can oust the jurisdiction of the Board to hear and determine a dispute relating to the said procurement under the provisions of Section 4(2)(f) of the Act indeed under the provisions of the Kenyan Constitution"**

65. The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or grant where the Government of Kenya is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign government, entity or multilateral agency.

66. The application or otherwise of such a bilateral treaty or agreement to the use of funds in a procurement is the relevant factor, and is what places such a procurement under the realm of international law, and therefore not amenable to resolution by application of domestic law and specifically review. It is notable that even though ouster clauses are generally construed narrowly, in the present case and as shown in the foregoing, the Constitution expressly allows for the application of international law as opposed to domestic law in such circumstances.

67. In this respect, the Respondent relied on the decision in **Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & Another (supra)** for its findings. However, it is notable that the need for a clarification of the circumstances in which the procurement is being made was also alluded to by Odunga J. in the said decision as follows:

“173. I therefore agree with the Respondent and the interested party herein that a purposeful reading of section 4(2)(f) of the PPAAD Act must necessarily lead to the conclusion that for a procurement to be exempted thereunder, one of the parties must be the Government of Kenya while the other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. I also agree that the rationale for such provision is clear must be to avoid the imposition of Kenyan law on another Government and that such procurement can only be governed by the terms of their bilateral or multilateral agreement, which agreements are of course subject to Parliamentary scrutiny. This exception would be justified under Article 2(5) of the Constitution which provides that the general rules of international law shall form part of the law of Kenya.”

68. A similar holding was made in **Republic vs Public Procurement Administrative Review Board Ex-parte Geothermal Development Company Limited & Another (supra)**, and in the two cases, Odunga J. found that the procuring entity was not the Government of Kenya but statutory bodies, and that therefore section 4(2)(f) of the Act was not applicable.

69. It is common ground in the present application that the advertisement for the Tender No. KP1/6D.4/PT/1/17 provided as follows:

**“SPECIFIC PROCUREMENT NOTICE (SPN)**

**Procurement of Plant Supply, Installation and Commissioning of 550kW Solar Plant at Lodwar Power Station – Kenya Electricity Expansion Project (KEEP)**

**Date:** 18<sup>th</sup> April, 2017

**Grant No:** NDF C24

**IFB No:** KP1/6D.4/PT/1/17

1. The Government of the Republic of Kenya (GoK) received financing from the Nordic Development Fund (NDF) towards the cost of Kenya Electricity Expansion Project (KEEP). It is intended that part of the proceeds of this grant will be applied to eligible payments under the contract to Plant Supply, Installation and Commissioning of 550kW Solar at Lodwar

2. The Kenya Power & Lighting Company Limited (KPLC) now invites sealed Bids from eligible Bidders for Plant Supply, Installation and Commissioning of 550kW Solar at Lodwar Power Station. (herein called “the Facilities”) that consist of the major works to be carried out by the Contractor of the Kenya Electricity Expansion Project (KEEP) which include installation of Solar Energy and Battery Storage System.

Details as tabulated below:

IFB No.	DESCRIPTION OF SERVICES	BID SECURITY
KP1/6D.4/PT/1/17	Procurement of Plant Supply, Installation and Commissioning of 550kW Solar Plant at Lodwar Power Station – Kenya Electricity Expansion Project (KEEP)	Euro 50,000 or Kenya Shillings 6,000,000

International Competitive Bidding (IFB) method with “Single Stage” Bidding Procedures will be followed in accordance with the World Bank’s Rules and Procedures for Procurement of Goods and works

3. Interested eligible bidders may obtain further information from the Chief Engineer at the address below:

Chief Engineer, Off-Grid Power Stations,

The Kenya Power & Lighting Company Limited,

Electricity House, Harambee Avenue,

P.O Box 30099-00100

Nairobi, Kenya

Tel: +254 20 3211663

E-mail: [HKapsowe@kplc.co.ke](mailto:HKapsowe@kplc.co.ke)

70. In addition, the Bid document for the said Tender specifically provided in section II on Bio Data Sheet that while the Applicant was the Employer, the Government of Kenya was the borrower of the funds. The tender advertisement clearly indicated that the funding for the tender was to be by funding by the Nordic Development Fund, and the financing agreement between the Government of Kenya and the Nordic Development Fund was also produced and annexed by the Applicant. The Applicant also annexed evidence of correspondence with the Nordic Development Fund, and in particular with regards to its indication of no objection to the said tender.

71. Furthermore, no evidence was brought by the Respondent or 1<sup>st</sup> Interested Party to demonstrate the inapplicability of the agreement between the Government of Kenya and the Nordic Development Fund dated 6<sup>th</sup> October 2012 to the subject procurement proceedings as alleged by the Applicant. The applicability of the said agreement to the procurement was thus a material and relevant factor that ought to have been taken into account by the Respondent in its determination as to whether or not it had jurisdiction, and failure to do so made its decision of 19<sup>th</sup> April 2018 erroneous, especially in light of the provisions of section 4(2)(f) of the Act.

72. The said agreement specifically provides in its Preamble that the Nordic Development Fund is a multilateral Development financing institution set up in an agreement entered into by the Governments of Denmark, Finland, Iceland, Norway and Sweden that funds projects on concessional terms, and that the projects under the agreement will be carried out by Kenya Power (the Applicant) as the implementing agency under the supervision of the Ministry of Energy. It was thus the case that unlike the position obtaining in **Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & Another (supra)** and **Republic vs Public Procurement Administrative Review Board Ex-parte Geothermal Development Company Limited & Another (supra)**, in the present case there was evidence to show that the subject procurement were being undertaken by the Applicant as an agent of the Government.

73. In addition, a specific dispute resolution method is provided for by Article IX of the agreement, in the event of interpretation, application and enforcement of the agreement which was to be by way of arbitration by under the rules of the Permanent Court of Arbitration.

74. A second error of significance that was also committed by the Respondent was its failure to take into consideration the provisions of the tender advertisement, that clearly stated that the World Bank Guidelines on Procurement for Goods and Services would apply to the tender. Therefore, the Respondent would still not have had jurisdiction under section 6(1) of the Act, as the choice of law that was to apply to the procurement proceedings was clearly stated in the said tender, and superseded the provisions of the Act under section 6(1) of the Act, when read in conjunction with section 4(2)(f).

75. Arising from the findings in the foregoing, this Court finds that the section 4(2)(f) and 6(1) of the Act were applicable in the present case, and ousted the Respondent's jurisdiction to hear the 1<sup>st</sup> Interested Party's Request for Review No. 42 of 2018 as there was evidence brought to show that the subject procurement therein was being undertaken under an agreement between the Government of Kenya and the Nordic Development Fund dated 6<sup>th</sup> October 2012. The Respondent's decision thereon dated 18<sup>th</sup> April 2018 is therefore null and void *ab initio*, and it is thus not necessary to address the issues raised as regards the substance of the said decision in terms of its legality or otherwise.

76. The only outstanding issue is whether the Applicant is entitled to the relief sought. The Applicant has in this regard sought orders of certiorari and prohibition and a declaration. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge (supra) inter alia** as follows as regards the nature of the orders of prohibition and certiorari:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

77. The Respondent has been found to have acted without jurisdiction under Act, and cannot have any jurisdiction in the future to act with respect to the subject tender for the reasons given in the foregoing. The Applicant is thus entitled to the orders sought of certiorari to quash the impugned decision by the Respondent made on 19<sup>th</sup> April 2018, and to the order of prohibition to prevent the Respondent from assuming jurisdiction with respect to the tender that was the subject of this application.

78. The remedy of a declaration on the other hand is normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a public body's powers and duties, the rights of individuals or the law on a particular issue. The only limitations as to grant of declarations is in purely moral, social, or political matters in which no issue of law or rights arises; where it will serve no practical purpose; or where a court has not heard contested argument on the issue to which the declaration relates and it is likely to affect other parties who are not party to the case. (See **Jonathan Moffatt et al, Judicial Review: Principles and Procedures** (2013) at chapter 30.16 to 30.24).

79. The last situation arises in the present application, as the declaration sought by the Applicant is in very wide terms as to cover all bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency, in which it is an implementing agency. These agreements have not been specified by the Applicant, and were not the subject of this application, and neither have the parties affected thereby been heard on the order sought thereon.

80. In the premises this Court finds that the Applicant's Notice of Motion dated 13<sup>th</sup> August 2018 is merited to the extent of the following orders:

**I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of being quashed the Respondent's entire decision in the ruling delivered on 19<sup>th</sup> April, 2018 in Request for Review No. 42 of 2018.**

**II. An order of Prohibition be and is hereby issued prohibiting and/or restraining the Respondent from entertaining any other and/or further administrative review touching on procurement of Plant Supply, Installation and Commissioning of 550 KW Solar Plant- Kenya Electricity Expansion Project (KEEP) (ICB No. KPI/6D.4/PT/1/17)**

**III. The Respondent and 1<sup>st</sup> Interested Party shall meet the Applicant's costs of the Notice of Motion dated 13<sup>th</sup> August 2018.**

81. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MARCH 2019**

**P. NYAMWEYA**

**JUDGE**