



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 312 OF 2018**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015 AND PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS 2006**

**AND**

**IN THE MATTER OF ARTICLES 10, 47, 59, 159 AND 227 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF A DECISION GIVEN ON 23<sup>RD</sup> JULY 2018 BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN RESPECT OF REQUEST FOR REVIEW NO. 58 OF 2018.**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

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

**-AND-**

**NAIROBI CITY WATER & SEWERAGE**

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

**-AND-**

**MACHIRI LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE :**

**FOURWAY CONSTRUCTION COMPANY LIMITED**

**JUDGMENT**

## **The Application**

1. Fourway Construction Limited which is the *ex-parte* Applicant herein, (hereinafter “the Applicant”), and Machiri Limited (hereinafter the 2<sup>nd</sup> Interested Party”) are companies registered under the Companies Act and carrying on business in the Republic of Kenya. They were both bidders in a tender advertised on 17<sup>th</sup> March 2018 by Nairobi City Water & Sewerage Company Limited (the 1<sup>st</sup> Interested Party herein), for the proposed relocation of Water and sewer Pipelines along Waiyaki Way, under Tender Number KPC/PU/529-LP/17 (hereinafter “Tender No. NCWSC/26/2017”). The 1<sup>st</sup> Interested Party is a company incorporated under the Water Act, and responsible for the provision, connection and supply of water and sewerage services within Nairobi City County.

2. After the opening of the tender and its evaluation, the 1<sup>st</sup> Interested Party notified the Applicant in a letter dated 18<sup>th</sup> June 2018 that its bid had been accepted, and the said Applicant accepted the award of the tender on 21<sup>st</sup> June 2018. The 2<sup>nd</sup> Interested Party thereupon challenged the decision of the 1<sup>st</sup> Interested Party to award the tender to the Applicant by way of a Request for Review Application No. 85 of 2018, which was filed on 2<sup>nd</sup> July 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 25<sup>th</sup> July 2018, the Respondent delivered its decision on the said Request for Review and made the following Orders:

***a) The Request for Review dated and filed by the Applicant on 2<sup>nd</sup> July 2018 in respect of Tender No. NCWSC/26/2017 for Proposed Relocation of Water and Sewer Pipelines along Waiyaki Way for Nairobi Water & Sewerage Company Limited be and is hereby allowed.***

***b) The award of the subject tender to the successful bidder Messrs Four ways Construction Limited be and is hereby annulled.***

***c) The Procuring Entity is directed to admit the Applicant back into the procurement process and subject its tender to technical evaluation alongside those of other tenderers or tenderer who made it to the technical evaluation stage and complete the procurement process, including the making of an award, within fourteen days from the date of this decision.***

***d) Since the procurement process which is the subject matter of this tender is not complete each party shall bear its own costs of this Request for Review.***

4. The Applicant, being aggrieved with the Respondent’s decision, filed judicial review proceedings herein after being granted leave, by way of a Notice of Motion Application dated 16<sup>th</sup> August 2018. The Applicant is seeking the following orders therein:

***a) An order for Certiorari be issued to remove into this Court for the purposes of being quashed the decision of the Respondent given on 23<sup>rd</sup> July, 2018 in respect of PPARB Application No. 85 of 2018 annulling the award of Tender No. NCWSC/26/2017 for the proposed relocation of water and sewer pipelines along Waiyaki Way Nairobi to the Ex-parte Applicant, and further directing the 1<sup>st</sup> Interested Party *inter alia*, to re-open the evaluation process, complete the evaluation process and the award the said tender afresh within fourteen (14) days.***

***b) An order of Certiorari be issued to remove into this Court for the purpose of its being quashed the decision of the Respondent given on 23<sup>rd</sup> July, 2018 reinstating the 2<sup>nd</sup> Interested Party back into the evaluation process in respect of the said Tender No. NCWSC/26/2017.***

***c) An order of Prohibition be issued directed at the 1<sup>st</sup> Interested Party prohibiting it from carrying out a fresh Technical and Financial Evaluation of the Tenders of the 2<sup>nd</sup> Interested Party and of the Ex-parte Applicant in pursuit of the orders arising out of the decision of the Respondent made on 23<sup>rd</sup> July, 2018.***

***d) An order of Mandamus be issued directed at the 1<sup>st</sup> Interested Party compelling it to enter and sign a contract agreement of the said Tender No. NCWSC/26/2017 with the Ex-parte Applicant as recommended by the 1<sup>st</sup> Interested Party’s Evaluation Committee and in accordance with the Notification of the Award of the Tender dated 18<sup>th</sup> June, 2018.***

***e) THAT this Court be pleased to give such further orders and directions as it may deem fit and just to grant.***

***f) THAT cost of this application be provided for.***

5. The Application is supported by the grounds on its face, the Applicant’s Statutory Statement dated 31<sup>st</sup> July, 2018, and a Verifying Affidavit and Supporting Affidavit sworn on 31<sup>st</sup> July, 2018 and 16<sup>th</sup> August, 2018 respectively by Caroline Muthoni Mureithi, one of the Applicant’s Directors, In response, the Respondent filed a Replying Affidavit opposing the application, that was sworn on 17<sup>th</sup> October, 2018 by its Secretary, Hencock Kirungu. The 1<sup>st</sup> Interested Party in response filed a Replying Affidavit in support of the application sworn on 19<sup>th</sup> September, 2018 by Benedict Kiema, its Supply Chain Manager; while the 2<sup>nd</sup> Interested Party filed a Replying Affidavit opposing the application sworn on 14<sup>th</sup> September, 2018 by James Mbugua Macharia, its Director.

6. The Application was canvassed by way of written submissions which were highlighted during a hearing held on 2<sup>nd</sup> August 2018. George Kangethe Advocate filed submissions dated 31<sup>st</sup> January 2019 on behalf of the Applicant, which he highlighted during the hearing. The

Respondent's submissions were dated 18<sup>th</sup> February 2019 and were filed by Mr. K. Odhiambo, Litigation Counsel at the Attorney General's Chambers, who also highlighted the same at the hearing. Mbugwa Atudo & Macharia Advocates filed submissions dated 11<sup>th</sup> February 2019 for the 1<sup>st</sup> Interested Party, which its counsel, Mr. Macharia, referred to in his oral submissions. Mr. Marete for the 2<sup>nd</sup> Interested Party on his part based his highlights on written submissions dated 15<sup>th</sup> June 2018, that were filed by Mwaniki Gachoka & Company Advocates.

### **The Applicant's Case**

7. The Applicant avers that on 17<sup>th</sup> March, 2018, an invitation for bids was published in the *Daily Nation* and *Standard* newspapers by the 1<sup>st</sup> Interested Party for Tender Reference No. NCWSC/26/2017, for the proposed relocation of Water and Sewer Pipelines along Waiyaki Way. The closing date for the tender was Friday 6<sup>th</sup> April, 2018. Clarifications were sought by all the interested candidates, and the Respondent clarified through an Addendum dated 4<sup>th</sup> April, 2018 and the closing date was also extended to 13<sup>th</sup> April 2018 at 12 noon.

8. The Applicant stated that it expressed interest, and duly submitted its tender documents to the 1<sup>st</sup> Interested Party in the prescribed form and within the stipulated timelines. That the tenders were opened on 13<sup>th</sup> April 2018 at 12 noon as scheduled and it emerged that 13 bidders had submitted their bids. Further, that during the Tender Opening meeting on 13<sup>th</sup> April 2018, each of the 13 bidder's bids opening checklist was read out and recorded. It is the Applicant's case that upon opening the tenders, it transpired that the 2<sup>nd</sup> Interested Party's document was not serialized or paginated on all pages, as required and set out in the Tender Document at Section II on "Evaluation Criteria". The Applicant further contends that the said requirements were mandatory therefore, it was manifestly clear in the Tender Document and to all bidders that failure to comply with the preliminary evaluation requirements under Section II one would not proceed to the Technical Evaluation stage.

9. Accordingly, that since the bid by the 2<sup>nd</sup> Interested Party was not serialized in accordance with Section II Clause XVII of the Tender Document, it was noted on its Bid Opening Checklist and duly signed by its representative at the opening. It is the Applicant's case that the 2<sup>nd</sup> Interested Party failed to comply with the requirements under Section II of the Tender Document by failing to serialize or paginate all the pages of its bid document as required, but instead used its own format of serialization and as a result, they were dropped at the preliminary stage.

10. The Applicant contended that the 1<sup>st</sup> Interested Party then proceeded to conduct the evaluation of all the submitted tenders in three (3) categories as required by Regulation 47, 49 and 50 of the Public Procurement and Disposal Regulations 2006 namely preliminary, technical and financial evaluation. Further, that the Applicant's bid emerged successful and the most competitive, and that on 18<sup>th</sup> June, 2018, the 1<sup>st</sup> Interested Party notified the Applicant that its bid had been accepted and the contract agreement would be prepared for execution within fourteen (14) days. However, that the 2<sup>nd</sup> Interested Party subsequently challenged the award vide Application No. 85 of 2018 filed before the Respondent, which in its decision on 23<sup>rd</sup> July, 2018, annulled the award of the said tender. That the Respondent further directed the 1<sup>st</sup> Interested Party to re-open the evaluation process, admit the 2<sup>nd</sup> Interested Party back into the evaluation process, complete the evaluation process and award the tender afresh within fourteen (14) days leading to the instant application. The Applicant contends that the Respondent acted illegally, without jurisdiction, unconstitutionally and in blatant breach of the Public Procurement and Asset Disposal Act, 2015 and the Regulations thereto.

11. Mr. Kang'ethe submitted that the decision of the Respondent was capricious, unreasonable, arbitrary, oppressive and lacking any justification contrary to the law and ought to be quashed. He further submitted that the said decision failed to take into account the guidelines in the Public Procurement and Asset Disposal Act, 2015, and also breached the Applicant's right to fair administrative action. It was further his submission that the bid of the 2<sup>nd</sup> Interested Party was rightly rejected at the preliminary stage for failure to serialize the bid document contrary to Section 74(1)(i) of the Act. He relied on the case of **Republic vs Public Procurement Administrative Review Board ex Parte Kenya Medical Supply Agency & 3 Others, (2010) eKLR** for the proposition that the Board ought to act within the confines of the Act.

12. He stated that Regulation 47 and 48 of the Act provides that upon opening of the tender, the evaluation committee shall first conduct a preliminary evaluation to determine among other requirements whether the tender has been submitted in the required format. Accordingly, the court in the above cited decision quashed the decision of the Board which had waived the mandatory requirement of the law. It was counsel's submission that the serialization or pagination was a mandatory requirement as provided by statute, and therefore the Board acted contrary to the said requirement by waiving the said requirement to excuse the 2<sup>nd</sup> Interested Party from compliance with the mandatory requirements.

13. He also relied on the case of **Republic vs Public Procurement Administrative Review Board Ex-Parte MFI Leasing Limited, (2012) eKLR** in which the court set out the circumstances under which an order of certiorari can issue. In addition, that the factors to be taken into account for issuance of orders of prohibition and certiorari were similarly set out in the case of **Paul Kiplagat Birgen & 25 Others vs Interim Independent Electoral Commission & 2 Others, (2011) eKLR**. Further, he relied on the case of **Republic vs Public Procurement Administrative Review Board & Anor Ex-Parte Copy Cat Limited (2017) eKLR** where the court in dismissing the Applicant's argument, stated that section 80(2) of the Act states that evaluation and comparison shall be done using the procedures and criteria set out in the tender documents.

14. In conclusion, Mr. Kang'ethe submitted that the Respondent failed to appreciate the rationale and vital importance for serialization of every page as a mandatory provision of the law, and a requirement under the subject tender documents which was specifically meant to prevent any allegations of fraud by any bidders who may allege that some pages were removed from or added to their submitted documents. As such, he urged the Court to issue the orders of Certiorari and Mandamus.

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

15. The Respondent deponed that it received a Request for Review in the matter of Tender No. NCWSC/26/2017 for the proposed relocation of water and sewer pipelines along Waiyaki Way, and immediately directed that the 1<sup>st</sup> Interested Party be served and notified of the

pending review as required by the provisions of section 168 of the Public Procurement and Asset Disposal Act, 2015. Further, that the said Request for Review was subsequently heard and decision rendered on 23<sup>rd</sup> July, 2018 nullifying the award of Tender No. NCWSC/26/2017 to the Applicant. The Respondent further averred that in arriving at the said decision, it was alive to the issues raised by the parties, and was well informed of all the applicable provisions of the law, and that it observed the rules of natural justice hence its decision was reasonable, rational and lawful. Accordingly, that it was persuaded that the procuring entity was not justified in declaring the 2<sup>nd</sup> Interested Party's tender as not serialized, and hence directed the 1<sup>st</sup> Interested Party to readmit the 2<sup>nd</sup> Interested Party back into evaluation. It was therefore the Respondent's contention that the present application is brought in bad faith, has no merit and ought to be dismissed.

16. Mr. Odhiambo submitted that the reach of judicial review was established by Korir J in **Republic vs Public Procurement Administrative Review Board Ex-Parte Gibb Africa Limited & Anor, (2012) eKLR**. Similarly, that the Court of Appeal in **Grain Bulk Handlers Limited vs J.B. Maina & Co. Ltd & 2 Others (2006) eKLR** summarized the purpose of judicial review by stating that judicial review jurisdiction regulates the process by which a decision making given by the law is exercised by the person or body given jurisdiction. He further relied on the case of **Pastoli vs Kabale District Local Government Council & Others ,(2008) 2 EA 300** where it was held that in order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

17. On whether the decision of the Respondent was unreasonable, counsel relied on the case of **Republic vs Kenya Power & Lighting Company Ltd, (2013) eKLR** and submitted that the onus is placed on the Applicant to demonstrate that the decision of the Respondent was so absurd in the eyes of a sensible man. He was further guided by the case **Republic vs Public Procurement Administrative Review Board Ex-Parte Gibb Africa Limited & Anor (supra)** where Korir J. held that the only ground upon which the Applicants can be allowed to challenge the decision of the 1<sup>st</sup> Respondent is that of unreasonableness or irrationality, and that the test of reasonableness was set out in the English case of **Associated Provincial Picture House Ltd vs Wednesbury Corporation, (1947) 2 All ER 680**.

18. It was the counsel's contention that the Applicant is not disputing the procedure adopted in reaching the decision in question, neither is it alleging *mala fides* on the part of the Respondent, but instead challenging the merits of the Respondent's decision and the same cannot be a subject matter of judicial review which does not sit as an appellate court. He relied on the cases of **Republic vs Kenya Revenue Authority Ex Parte Yaya Towers Limited, (2008) eKLR**, **Seventh Day Adventist Church (EA) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development and Anor, (2014) eKLR** and **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** to buttress this argument.

19. In conclusion, counsel cautioned against the court interfering with the decision of the administrative bodies which have the special skill and expertise to make decisions more profound and more deserving in such fields of administration as was held in the case of **Republic vs Public Procurement Administrative Review Board & 2 Others Ex-parte International Research and Development Actions Ltd, (2017) eKLR** and the case of **Kenya Pipeline Company vs Hyosung Ebara Company Ltd & 2 Others, (2012) eKLR**. Accordingly, he submitted that the application does not meet the threshold for the grant of the orders sought and urged the court to dismiss the application with costs.

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

20. The 1<sup>st</sup> Interested Party deponed that in July 2016, the Kenya National Highways Authority signed a contract for the expansion of a 25 kilometers stretch of a road along Waiyaki Way, and that execution of the said project entailed the relocation of water pipes and other utility infrastructure along the project road. Consequently, the 1<sup>st</sup> Interested Party published an open tender notice in the local print and electronic media in March 2018, of which 13 bidders responded to the said open tender. That the tender opening was held on 13<sup>th</sup> April, 2018 at 12 o'clock at the 1<sup>st</sup> Interested Party's head office, and upon reviewing the bid documents, the Tender Opening Committee noted that all the 13 bidders who had submitted bids had serialized their bid documents except the 2<sup>nd</sup> Interested Party.

21. It is the 1<sup>st</sup> Interested Party's case that the serialization of the bid documents in accordance with Section 74(1)(i) of the Act was a mandatory requirement for the preliminary evaluation stage. It averred that the evaluation committee on 26<sup>th</sup> April, 2018 carried out a preliminary evaluation exercise and established that only the Applicant's bid was responsive, and the said bid was subjected to technical evaluation and thereafter financial evaluation. Having satisfied all the preliminary evaluation as well as the technical and financial criteria set in the bid document, the evaluation committee recommended that the tender be awarded to the Applicant. The Applicant was thereafter notified in writing on 18<sup>th</sup> June 2018 that it had been awarded the tender, and the other 12 unsuccessful bidders also informed in writing that they were not successful with each letter specifying the reasons they were unsuccessful.

22. The 1<sup>st</sup> Interested Party explained that the 2<sup>nd</sup> Interested Party was aggrieved by the said decision, and commenced review proceedings, and that the Respondent rendered a decision on 23<sup>rd</sup> July 2018 annulling the award, stating among other reasons that stipulating serialization as a mandatory requirement of the tender was unfair, thereby unlawfully declaring the 2<sup>nd</sup> Interested Party non-responsive. According to the 1<sup>st</sup> Interested Party, serialization of bid documents is a requirement of Section 74(1)(i) as read with Section 79(1) of the Act. As a result, that the 1<sup>st</sup> Interested Party is now behind schedule in its mandated task or relocating water and sewer pipes, and it urged the court to quash the Respondent's decision.

23. Mr. Macharia submitted that serialization of the bid documents in accordance with the provisions of Section 74(1) (1) of the Act was a mandatory requirement. Therefore, the finding by the Respondent that the 2<sup>nd</sup> Interested Party complied with the requirement for serialization in a manner unique and understood only by it, since all the other 12 bidders complied with the correct requirement, is outrageous and absurd in its defiance of logic or accepted canons of interpretation, that no reasonable person or judicial tribunal that fairly applied its mind to this question would have arrived at such a decision.

24. Further, section 80(2) of the Act mandates the evaluation committee to evaluate the tender using the criteria asset in the tender

documents, and the 1<sup>st</sup> Interested Party relied on the case of **Republic vs Public Procurement Administrative Review Board & 3 Others Ex-parte Saracen Media Limited, (2018) eKLR** where it was held that it is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be registered as non-responsive and rejected without further consideration. He also relied on the case of **Republic vs Public Procurement Administrative Review Board & 2 Others Ex-parte Coast Water Services Board & Anor, (2016) eKLR** and **Bedford Muriithi Munyitta vs Faith Kagendo Njeru, (2010) eKLR** for this proposition.

25. On whether the Respondent acted in excess of its jurisdiction by purporting to excuse the 2<sup>nd</sup> Interested Party from full compliance, counsel submitted that by effectively creating a lower, indeed waiving, the serialization criteria that all the other 12 bidders understood and were subjected to, the Respondent's decision is in violation of Article 227(1) of the Constitution, an unjust and unfair advantage to the 2<sup>nd</sup> Interested Party which is not sanctioned by law and in plain violation of Section 74(1)(i) of the Act. He submitted that the waiver undermines the tender process in violation of section 3 (b) and (d) of the Act.

26. In conclusion, he submitted that the Respondent made a mistake in its finding that the 2<sup>nd</sup> Interested Party's bid was rejected at the tender opening committee stage, as the said bid was declared non responsive by the evaluation committee and not the tender opening committee. Secondly, that the Respondent's interpretation of Section 78(5) of the Act is erroneous to the extent that it finds a requirement for the procuring entity to assist a bidder in counting the pages in its bid, which is the very purpose, other than securing the integrity of the bid document, for which Section 74(1)(1) of the Act requires in mandatory terms that the bidders should serialize the pages of their bids. Further, that the Respondent substituted a mandatory criteria with an arbitrary criteria for the 2<sup>nd</sup> Interested Party which it identified as "separators "or" page dividers". Lastly, that it is not in dispute that the 2<sup>nd</sup> Interested Party did not serialize its bid document as required in the tender documents and as such the Respondent's decision ought to be quashed. They therefore urged the court to allow the application with costs to the Applicant and itself.

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

27. The 2<sup>nd</sup> Interested Party averred that on 17<sup>th</sup> March, 2018, the 1<sup>st</sup> Interested Party invited for bids in the *Daily Nation* and the *Standard* newspapers for Tender Reference No. NCWSC/26/2017, for the proposed relocation of water and sewer pipelines along Waiyaki Way, Nairobi. Further, that it submitted its bid for the said tender to the 1<sup>st</sup> Interested Party in the prescribed form and within the stipulated time, and that when the bids were opened on 13<sup>th</sup> April, 2018 at 12 noon, it emerged that 13 bidders had bid for the said tender. It is further averred that during the tender opening, the 1<sup>st</sup> Interested Party's Tender Committee opened, counted and recorded the number of pages for every tender submitted except the one for the 2<sup>nd</sup> Interested Party because it was not serialized.

28. It is the 2<sup>nd</sup> Interested Party's case that the Act places the obligation on the Tender Opening Committee to assign an identification number to each tender and record the number of pages received, and that the Committee was therefore in breach of section 78(5) of the Act for failing to record the number of pages for the 2<sup>nd</sup> Interested Party's bid. Further, that no tenderer should be disqualified during the opening of tenders, and the role of the Tender Opening Committee does not extend to establishing whether a tender has been serialized or not, and therefore exceeded its mandate as that is the role of the tender evaluation committee.

29. The 2<sup>nd</sup> Interested Party averred that it was informed by the 1<sup>st</sup> Interested Party *vide* a letter dated 18<sup>th</sup> June, 2018 that their bid was non-responsive for the reason that it did not serialize every page of the bid document submitted. That it accordingly filed a Request for Review, and all the interested parties were heard and a decision delivered by the Respondent on 23<sup>rd</sup> July 2018. Further, that the Respondent held, among other things, that the tender opening committee exceeded its mandate in purporting to determine that the 2<sup>nd</sup> Interested Party's tender was not serialized, as this was solely the role of the tender evaluation committee leading to the instant application. The 2<sup>nd</sup> Interested Party contended that the application herein is incompetent, bad in law as the Respondent acted within its powers and accorded all parties an opportunity to be heard. That in any event, the Applicant has not pleaded with precision the alleged illegalities by the Respondent, neither has it disputed the manner or process in which the Respondent arrived at its decision, but instead challenges the merits of the decision which ought to be challenged by way of an appeal. It therefore urged court to dismiss the application with costs.

30. Mr. Marete who appeared together with Mr. Kamau Muturi for the 2<sup>nd</sup> Interested Party, submitted that the Request for Review was heard within the statutory period of 21 days and all parties accorded a reasonable and fair opportunity to be heard. They further submitted that the particulars of the Respondent's alleged unlawfulness, unreasonableness and unfairness have not been specifically pleaded. Further, that the Respondent acted within the purview of the Public Procurement and Assets Disposal Act.

31. On whether the findings of the Respondent can be challenged on merits by way of judicial review, counsel submitted that the substratum of the Applicant's application is the question of whether the 1<sup>st</sup> Interested Party's document was serialized, and this court in determining this issue would have to go into the merits of the decision. Secondly, the grounds relied upon by the Applicant in its application raises issues of law and fact which if entertained, will invoke this court to go into the substance and veracity of the decision and begin evaluating the evidence, consequently leading it to exercise the exclusive role of the appellate court.

32. To buttress this argument, they relied on the Court of Appeal decision in **OJSC Power Machines Limited, TransCentury Limited and Civicon Limited (Consortium) vs Public Procurement Administrative Review Board Kenya & 2 Others, (2017) eKLR** where it was held that judicial review is concerned with the decision making process, not with the merits of the decision itself. The position has been reiterated by the Court of Appeal in **Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium vs Public Procurement Administrative Review Board, (2017) eKLR**. They further relied on the Court of Appeal decision in **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others, (2012) eKLR** where it was held that where the proceedings of the review board were regular and it had jurisdiction to adjudicate upon the matter raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. Accordingly, this court lacked the requisite jurisdiction to carry out a review of the Respondent's decision.

33. They further argued that the Respondent is a specialized tribunal whose membership is drawn from different professional backgrounds as provided by section 29 of the Act and regulation 68(1) of the Public Procurement Regulations, 2006. They placed reliance on the case of **Kenya Squash Racquets Association vs Sport Disputes Tribunal & Anor, (2018) eKLR.**

34. On whether the Applicant demonstrated sufficient grounds for grant of judicial review orders, they submitted that the Applicant had pleaded unsubstantiated grounds which do not merit the orders sought and relied on the case of **Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others, (1997) eKLR, Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others (supra)** and **Energy Regulatory Commission vs SGS Limited & 2 Others, (2018) eKLR.** In conclusion, they submitted that the Applicant failed to make a case for any of the prayers sought and urged the court to dismiss the application with costs.

### **The Determination**

35. I have considered the pleadings, submissions and arguments made by the parties, and note that a preliminary issue was raised by the Respondent and 2<sup>nd</sup> Interested Party as to whether the instant application raises issues that are amenable to judicial review. They urged that the application is in the nature of an appeal disguised as judicial review, as it requires this Court to address the merits of the Respondent's decision in light of the evidence that was before it. Further, that it is not disputed that the Respondent acted within its jurisdiction, and no procedural improprieties are alleged on its part. The Applicant and the 1<sup>st</sup> Interested Party on the other hand urged that there is no total bar to this Court examining the evidence before the Respondent in making a determination as to the legality of the Respondent's decision, and that the Fair Administrative Actions Act gives this Court powers to review a decision if it fails to take into account a material factor.

36. It is thus imperative at the outset to delineate the parameters of this Court's powers in judicial review, and the propriety of the Applicant's application in this regard. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

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

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

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

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

37. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** as follows:

**“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 or did he take into account irrelevant matters? These are the kind of 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 or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”**

38. With the enactment of a new Constitution in 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, *even though the reviewing court has no mandate to substitute its own decision for that of the administrator.*

39. In addition, there are established grounds for judicial review that require this Court to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. These grounds are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence. Two such grounds have been raised by the Applicant herein, which is the failure of the Respondent to take into account relevant factors set by law as regards serialization of the 2<sup>nd</sup> Interested Party's bid document, and that its decision was thereby irrational. The Applicant's application is thus properly before this Court.

40. This Court will thus proceed to address the substantive issues arising for determination, which are as follows:

- a) Whether the Respondent's decision made on 25<sup>th</sup> July 2018 on the 2<sup>nd</sup> Interested Party's Request for Review was made in error of the law.
- b) Whether the Respondent in its decision made on 25<sup>th</sup> July 2018 failed to take into account relevant factors as regards serialization of the 2<sup>nd</sup> Interested Party's bid document.
- c) Whether the Applicant merits the relief sought.

***On Whether the Respondent acted in error of law***

41. On the first issue as to the legality of the Respondent's decision, the first limb of the arguments made in this regard by the Applicant and 1<sup>st</sup> Interested Party was that the Respondent erred in law in finding that the 2<sup>nd</sup> Interested Party's bid documents were properly serialized, and that it was responsive to the tender document. In determining whether or not the Respondent in this regard acted in error of law, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. It is therefore necessary when deciding whether a law has been correctly interpreted, to identify and construe the scope of the applicable statutory provisions.

42. In the present application, it is not disputed that the 1<sup>st</sup> Interested Party's Tender Document, in section II under the Title "EVALUATION CRITERIA" at page 18 thereof, specifically stated that all contractors were to meet certain specified mandatory criteria to be considered responsive. In addition, in the Preliminary Evaluation, one of the mandatory criteria set in paragraph xvi thereof was that "*Bidders MUST serialize EVERY page of the bid document submitted*".

43. Serialization of the bid document is also a requirement set by law in relation to the contents of tender documents under section 74 (1)(i) of the Public Procurement and Asset Disposal Act (hereinafter "the Act"). The said section reads as follows:-

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

- (a) the name and address of the procuring entity;**
- (b) the tender number assigned to the procurement proceedings by the procuring entity;**
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;**
- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;**
- (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;**
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;**
- (g) applicable preferences and reservations pursuant to this Act;**
- (h) a declaration that the tender is only open to those who meet the requirements for eligibility;**
- (i) requirement of serialisation of pages by the bidder for each bid submitted; and**
- (j) any other requirement as may be prescribed.**

**(2) All tender documents shall be sent out to eligible bidders by recorded delivery."**

44. The ordinary meaning of serialisation is to [publish](#) or [present](#) something in the form of a [serial](#). The **Concise Oxford English Dictionary** defines a serial as "consisting of, forming part of, or taking place in a series" and further defines "to serialise" as "to arrange in a series". A "series" is on the other hand defined as "a number of similar or related things coming one after another". Therefore the ordinary meaning and interpretation of serialization of pages is that each page must be arranged and presented in a manner that it is evident that a page is coming after another page.

45. For a purposive interpretation of the provisions of the law regarding serialisation of the pages of bid documents, one needs to consider the principles and objectives underlying public procurement law, which are stipulated under both under the Constitution and the Act. Article 227(1) of the Constitution in this regard 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. Section 3 of the Act provides for the guiding principles of public procurement as follows:

**"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 Articles 55 and 56;
- (d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);
- (e) the principles of public finance under Article 201;
- (f) the values and principles of public service as provided for under Article 232;
- (g) principles governing the procurement profession, international norms;
- (h) maximisation of value for money;
- (i) promotion of local industry, sustainable development and protection of the environment; and
- (j) promotion of citizen contractors.”

46. Two key principles and objectives come to play in the requirement for serialisation of every page of a bid document. The first is that following laid down rules of procedure is an important aspect of fairness, non-discrimination and equal treatment. Therefore, to allow non-conformity with the rules set down on serialisation of pages of bid documents will entail unequal and unfair treatment of other tenderers. This is especially so if other tenderers have acted on the said rules and have been caused prejudice in doing so - for example, if they have incurred costs and expenses in complying. Not following the rules also damages confidence in the system of public procurement for the longer term, to the detriment of value for money.

47. Secondly, compliance with the requirement of serialisation of every page of a bid document is crucial for good governance, transparency, and accountability. Non-conformity with this requirement will be open to abuse by procuring entities and bidders, who can deliberately plant documents, and use the opportunity for correction to advance their own interests. In addition, the possibility of accepting non-conforming tenders as regards serialisation of every page will require that discretion is given to procuring entities or reviewing bodies to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain bidders.

48. Section 79 of the Act in this regard provides as follows as regards responsive tenders:

- (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.
- (2) A responsive tender shall not be affected by—
  - (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or
  - (b) errors or oversights that can be corrected without affecting the substance of the tender.
- (3) A deviation described in subsection (2)(a) shall—
  - (a) be quantified to the extent possible; and
  - (b) be taken into account in the evaluation and comparison of tenders.

49. The requirement of serialisation was in the present case indicated to be a mandatory requirement in the 1<sup>st</sup> Interested Party’s tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialisation of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing.

50. I am in this respect in agreement with the decision of Mativo J. in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR** where the learned Judge held as follows:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with

standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

**20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”**

The learned Judge also made a similar holding in **Republic vs Public Procurement Administrative Review Board & 3 Others Ex-parte Saracen Media Limited**, (supra).

51. It is with this interpretations in mind that the Respondent’s findings in its decision dated 25<sup>th</sup> July 2018 on the issue of the serialisation and responsiveness of the 2<sup>nd</sup> Interested Party’s bid will be reviewed. The said findings were as follows:

**“It is clear from the tender document that other than stating that bidders must serialize all the pages in the tender document, the said document did not state what form such a serialization should take. This therefore left it open for every bidder to interpret such a requirement as it best understood it.**

**Turning to the bid submitted by the Applicant herein, the Board has perused the tender documents submitted to it and finds that the tender document was divided into various sections which were marked by separators identifying all the documents that formed part of the tender document which also summarized in an index documents that made the same easily identifiable.**

**This, in the Board’s view was sufficient serialization and the Board found not difficulty at all in following the contents of the Applicant’s tender document.**

**One need to also understand the purposes of serialisation of a tender document and also investigate what prejudice will be visited upon other bidders where a tender document is not serialized? The answer lies in the Procuring Entity’s own submissions in this Request for Review where it stated that the reason for serialization as a requirement in a tender document is to prevent allegations of fraud by bidders on account of some pages being removed from or added to the tender document. If that is the reason, it is in the interest of a bidder who submits a bid that its tender is serialized instead of the Procuring Entity trying to enforce the requirement as a mandatory requirement in the tender document and in the process, running the risk of stifling competition among renderers particularly where the pages in the tender document are easily identifiable and can be counted and be ascertained at tender opening.**

**As the Board has already observed the Applicant in this case delineated sections of its tender document and demarcated each section with a separation sheet and numerically labeled them 1 to 11 in the three volume documents it submitted as part of its tender. The Applicant placed its bid in a sequential format – the tender had three volumes, each volume had an index, each page was labeled and each page was stamped. The Board further observes that there was no requirement to place a number on each page or part of the tender documents. Accordingly, the board finds that the tender was serialised as required by the evaluation criteria set out in the Tender Document. It is the Board’s finding that the Applicant’s tender was therefore not lawfully declared as non-responsive.**

**In view of all the foregoing the board finds that the Procuring Entity was not justified in declaring the Applicant’s tender as not *serialised*. The Board further finds that he Applicant’s tender met the mandatory requirements of the tender document with regard to serialisation.”**

52. It is my finding that the Respondent made two errors in its interpretation and application of the law. In the first instance, the requirement of serialization of every page having been clearly stated to be mandatory in the 1<sup>st</sup> Interested Party’s tender documents and by section 74 of the Act, and there being no ambiguity as to what is meant by the term serialisation in the context of section 74, the Respondent erred by finding that the interpretation of the requirement is to be decided by, and will vary with each individual bidder. What will and may vary is the mode or manner of serialization, but the requirement of serialisation is not capable of differing interpretations, having been clearly set down by the law.

53. Secondly, the Respondent also made an error of law in its finding that the procuring entity should not have made the requirement of serialization of every page mandatory, and should therefore not have found the 2<sup>nd</sup> Interested Party’s bid non- responsive. As has been shown and explained in the foregoing, the requirement of serialization of every page of the bid document was expressly stated in the tender document to be mandatory, and is also required by the Act to be mandatory. In addition, non-conformity with the requirement of serialization of every page is not a minor variation that is capable of being waived under section 79 of the Act as is suggested by the Respondent ruling, for the reasons given in the foregoing.

### ***Whether the Respondent Considered Relevant Factors***

54. The Respondent in its findings proceeded to find that the 2<sup>nd</sup> Interested Party's bid document was serialized, which brings me to the second issue for determination. As this was a finding by the Respondent based on the evidence before it, this Court's role is limited to examining whether or not the Respondent took into account the relevant factors and was rational reasonable. The general rule on failure to take into account relevant considerations was stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223** that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard. The extent to which a public body inquires into a particular factor, and the weight to be attached to a factor, are however matters to be decided by the public body, provided its acts reasonably. In addition, the considerations to be taken into account will also depend on the circumstances of each case.

55. This court also has power to set aside a decision on the ground that the decision is irrational in its defiance of logic or of accepted standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. This principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (supra)** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)**.

56. The 2<sup>nd</sup> Interested Party availed the original bid document to the Court for perusal during the hearing, and also availed copies for the court record, and submitted that its bid was serialized, as it had a table of contents; was divided into sections, with each section separated by a coloured divider; and each document was clearly titled, and could therefore be identified. The Applicant and 1<sup>st</sup> Interested Party on the other hand argued that there was no serialization or pagination of every page as required.

57. The reasons given by the Respondent for its finding that the 2<sup>nd</sup> Interested Party's bid document was properly serialized and therefore responsive were that the 2<sup>nd</sup> Interested Party placed its bid in a sequential format – that the tender had three volumes, each volume had an index, each page was labeled and each page was stamped. The Respondent further observed that there was no requirement to place a number on each page or part of the tender documents. There were no findings made by the Respondent as to the nature of the label and stamp on each page, and whether or how the said labels and stamps observed on each page ensured that the pages were following each other in a series, which is the material factors in serialisation of pages. To this extent, the Respondent failed to take into account the most important and definitive factor in the mandatory requirement of serialization of every page.

58. It was in this regard not material or relevant that the bid was arranged or presented in a sequential format by way of sections, or that each page could be identified or was labeled, in the absence of a finding as to how these factors addressed the requirement that each page should be presented as part of a series. The material factor that each page was presented by the 2<sup>nd</sup> Interested Party in a manner that identified the position or place of the page in relation to all other pages in the its bid document was not considered by the Respondent, neither was it addressed in its ruling. The Respondent's decision that the 2<sup>nd</sup> Interested Party's was serialized was therefore not supported by the applicable law and evidence, and was to this extent illegal and irrational.

59. The second limb of the arguments on error of law made by the Applicant and 1<sup>st</sup> Interested Party also urged that the Respondent erred in its finding that it was the 1<sup>st</sup> Interested Party's tender opening committee that found the 2<sup>nd</sup> Interested Party's non-responsive, and not the 1<sup>st</sup> Interested Party's tender evaluation committee as required by section 80 of the Act. The 1<sup>st</sup> Interested Party in this regard referred the Court to the tender opening committee and tender evaluation committee minutes as proof of this error. The 2<sup>nd</sup> Interested Party also alleged an error of law on the part of the 1<sup>st</sup> Interested Party's tender opening committee in the counting and recording of the pages of its bid.

60. A resolution of the issues raised in the said arguments will however require making findings of fact as to what transpired during the tender opening and evaluation, before a determination can be made as to whether or not the Respondent thereby made a mistake in its finding. This Court sitting as a judicial review Court cannot make any finding on disputed facts, and these grounds and arguments therefore properly lie in the province of an appeal.

### ***Whether the Applicant is entitled to the relief sought***

61. The last issue is that of the remedies sought by the Applicant. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards judicial review orders:

**“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...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a**

statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

62. The Applicant has sought orders of certiorari, mandamus and prohibition. This Court has found that in arriving in the decision made on 23<sup>rd</sup> July 2018, the Respondent acted in error of the law and *ultra vires* section 74 and 79 of the Act. The Applicant is therefore entitled to the orders sought of certiorari to quash the impugned decisions by the Respondent made on 23<sup>rd</sup> July 2018.

63. The effect of the orders of certiorari once granted will be to restore the status to the position it was before the decision of 23<sup>rd</sup> July 2018, and the award of the tender by the 1<sup>st</sup> Interested Party to the Applicant will therefore still stand. It is my view that the orders sought of mandamus and prohibition are to this extent also merited, to be able to restore the Applicant and 1<sup>st</sup> Interested Party to this status. Lastly, the Applicant having established that the Respondent acted illegally in its decision, the consequential actions that were required by the 1<sup>st</sup> Interested Party will therefore also be in contravention of the law, and the order of prohibition sought with regards to these actions are merited. In any event, since the Respondent’s decision of 23<sup>rd</sup> July 2018 has been found to be illegal, the same is null and void, and cannot be enforced by the 1<sup>st</sup> Interested Party.

64. I accordingly find that the Applicant’s Notice of Motion dated 16<sup>th</sup> August 2018 is merited to the extent of the following orders:

**I. An order for Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the Respondent given on 23<sup>rd</sup> July, 2018 in respect of PPARB Application No. 85 of 2018 annulling the award of Tender No. NCWSC/26/2017 for the proposed relocation of water and sewer pipelines along Waiyaki Way Nairobi to the *Ex-parte* Applicant, and further directing the 1<sup>st</sup> Interested Party *inter alia*, to re-open the evaluation process, complete the evaluation process and the award the said tender afresh within fourteen (14) days.**

**II. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the Respondent given on 23<sup>rd</sup> July, 2018 reinstating the 2<sup>nd</sup> Interested Party back into the evaluation process in respect of the said Tender No. NCWSC/26/2017.**

**III. An order of Prohibition be and is hereby issued prohibiting the 1<sup>st</sup> Interested Party from carrying out a fresh Technical and Financial Evaluation of the Tenders of the 2<sup>nd</sup> Interested Party and of the *Ex-parte* Applicant in pursuit of the orders arising out of the decision of the Respondent made on 23<sup>rd</sup> July, 2018.**

**IV. An order of Mandamus be and is hereby issued compelling the 1<sup>st</sup> Interested Party to enter into and sign a contract agreement of the said Tender No. NCWSC/26/2017 with the *Ex-parte* Applicant as recommended by the 1<sup>st</sup> Interested Party’s Evaluation Committee and in accordance with the Notification of the Award of the Tender dated 18<sup>th</sup> June, 2018.**

**V. The Respondent shall meet the Applicant’s costs of the Notice of Motion dated 16<sup>th</sup> August 2018**

65. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2019**

**P. NYAMWEYA**

**JUDGE**