



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 33 OF 2019

AND

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

AND

IN THE MATTER OF THE SECTIONS 46,79,80,83,85,86,155,167,173 AND 175 OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF ARTICLES 2, 7, 8, 9, 10, AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

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

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NUMBER 1 OF 2019

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

-AND-

KENYA AIRPORTS AUTHORITY.....1ST INTERESTED PARTY

MASON SERVICES LIMITED AND QNTRA

TECHNOLOGY LIMITED.....2ND INTERESTED PARTY

EX-PARTE :

KENYA AIRPORTS PARKING SERVICES LIMITED

JUDGMENT

Introduction

1. The *ex parte* Applicant herein is Kenya Airports Parking Services Limited, (hereinafter “the Applicant”), a company registered under the Companies Act. The Applicant is aggrieved with a decision made by the Public Procurement Administrative Review Board, the Respondent herein, which was made on 31st January 2019. 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.

2. The impugned decision of 31st January 2019 was on a Request for Review which had been filed with the Respondent by Mason Services Limited and Qntra Technology Limited, a consortium made up of two companies registered under the Companies Act. The said consortium is the 2nd Interested Party herein. The Applicant and 2nd Interested Party were both bidders in a tender advertised on 17th March 2018 by Kenya Airports Authority Limited for the Installation, Operation and Maintenance of an Automated Car Parking Management System at Jomo Kenyatta International Airport vide Tender Number KAA/JKIA/1343/2017-2018 (hereinafter “ the Tender”).

3. The Kenya Airports Authority is joined as the 1st Interested Party herein, and is a statutory corporation established by the Kenya Airports Authority Act, and responsible for the provision and management of all airports in Kenya. The 2nd Interested Party lodged two Requests for Review with the Respondent following the decision by the 1st Interested Party to award the said tender to the Applicant. The Respondent in its decision of 31st January 2019 cancelled and set aside the award of the Tender to the Applicant after hearing the 2nd Interested Party’s second Request for Review, and directed the 1st Interested Party to conduct due process on the bidder with the next best concession rate, including making of an award in respect of the said tender within 14 days of the decision.

4. The Applicant, being aggrieved, has filed the instant judicial review proceedings after being granted leave, by way of a Notice of Motion application dated 15th February 2019. The Applicant is seeking the following orders therein:

a) **An order of Certiorari do issue to remove into this Court for the purposes of quashing, and to quash, the Respondent’s decision dated 31st January 2019 made under Request for Review Application No 1 of 2019-Mason Services Limited & Another vs the Managing Director Kenya Airports Authority & Another regarding Tender Number KAA/OT/JKIA/1343/2017-2018.**

b) **An order of Prohibition do issue restraining the 1st Interested Party by itself, its agents or persons acting on its behalf from implementing the Respondent’s decision dated 31st January 2019 under Request for Review Application No 1 of 2019-Mason Services Limited & Another vs the Managing Director Kenya Airports Authority & Another regarding Tender Number KAA/OT/JKIA/1343/2017-2018.**

c) **An order of Prohibition do issue restraining the 1st Interested Party by itself, its agents or persons acting on its behalf from implementing the Respondent’s decision dated 31st January 2019 under Request for Review Application No 1 of 2019-Mason Services Limited & Another vs the Managing Director Kenya Airports Authority & Another regarding Tender Number KAA/OT/JKIA/1343/2017-2018.**

d) **An order of Mandamus be issued compelling the 1st Interested Party to proceed and sign the contract for Tender Number KAA/OT/JKIA/1343/2017-2018 with the Applicant.**

e) **Costs of this Application be borne by the 2nd Interested Party.**

5. The Application is supported by the grounds on its face, the Applicant’s Statutory Statement dated 11th February 2019, and a Verifying Affidavit and sworn on the same date by Bonnyventure Saronge, the Applicant’s Managing Director.

6. The Respondent did not file any response to the application or participate in these proceedings.

7. The 1st Interested Party filed a Replying Affidavit sworn on 25th February 2019 by Patrick Wanjuki, its General Manager, Procurement and Logistics, in support of the application; while the 2nd Interested Party filed a Replying Affidavit opposing the application sworn on 21st February 2019 by Stephen Njoroge, one of its Directors. The 2nd Interested Party in addition also filed a Notice of Preliminary Objection dated 12th March 2019, on the grounds that a necessary party, being the Managing Director of the 1st Interested Party was excluded from the proceedings. The parties by consent agreed that the said Preliminary Objection be treated as part of the 2nd Interested Party’s defence.

5. Before examining the respective parties’ respective cases, this Court considers it necessary to highlight the background to, and context in which the instant application arises. After the opening of the Tender and its evaluation, a company known as Endeavour Africa (K) Ltd was found to have submitted the best evaluated responsive tender. Upon conduct of due diligence on the said bidder, the 1st Interested Party discovered that the said company had submitted forged recommendation letters, and the company was declared ineligible pursuant to section 55 (5) of the Public Procurement and Asset Disposal Act. The Applicant was the second best evaluated tenderer, and after the conduct of due diligence on the Applicant, the 1st Interested Party awarded the Applicant with the tender in a letter dated 24th September 2018. By a letter of same date, the 2nd Interested Party and others were informed that they were unsuccessful.

6. The 2nd Interested Party was aggrieved by the award to the Applicant and filed the first request for review with the Respondent, being Request for Review No 149 of 2018, seeking *inter alia* a nullification of the award to the Applicant. It was the 2nd Interested Party’s contention that the Authority had failed to conform to the evaluation criteria as set out in the Tender, and that the Authority failed to carry out due diligence which would have shown that the Applicant was a foreign company. The Respondent rendered itself on the 25th October 2018 dismissing all other grounds raised by the 2nd Interested Party, and directing the Authority to undertake a fresh due diligence exercise on the Applicant and complete the task therein including making an award within fourteen (14) days from the date of the ruling.

7. Upon and after the subjection of the Applicant to due diligence, the 1st Interested Party was satisfied that the Applicant was a citizen contractor and will be able to perform the contract satisfactorily, and proceeded to award the Tender to the Applicant vide the letter of 3rd January 2019.

8. The 2nd Interested Party, still being aggrieved with the award to the Applicant, filed a second request for review with the Respondent being Request for Review Application No 1 of 2019, seeking nullification of the award to the Applicant on the ground that the Applicant submitted false and inaccurate information contrary to section 55 of the Public Procurement and Asset Disposal Act, as it had submitted inaccurate information in its Confidential Business Questionnaire Form contrary to the official records at the Registrar of Companies as evidenced by the CR12, and on the ground that the Applicant was a foreign company. The Respondent's decision on the second Request for Review is the one that is the subject of the instant application.

9. The instant application was canvassed by way of written submissions which were highlighted during a hearing held on 14th March 2019. Amuga & Company Advocates filed submissions dated 7th March 2019 on behalf of the Applicant, which were highlighted during the hearing by its lead counsel, Mr. Fred Ngatia SC. Margeret Munene Advocates filed submissions dated 11th February 2019 for the 1st Interested Party, which its counsel, Mr. Wakwaya, referred to in his oral submissions. Mr. Oyugi for the 2nd Interested Party on his part based his highlights on written submissions dated 12th March 2019, that were filed by Oyugi & Company Advocates.

The Applicant's Case

10. The Applicant's case is that the Respondent's decision is unreasonable and tainted with procedural impropriety, irrationality, excess of power, and illegality; is founded on grave misapprehension of the law; and that the Respondent failed to consider relevant matters and instead considered irrelevant matters in making its decision. According to the Applicant, the Respondent in its decision made on 31st January 2019 held that:

- a) The 1st Interested Party had complied with the directions of the Respondent Board as per the ruling of 25th October 2018, as it had conducted a fresh due diligence on the Applicant in accordance with the Tender and Section 83 of the Public Procurement and Asset Disposal Act,;
- b) The reference letters submitted by the Applicant were shown to be authentic; and
- c) The Applicant was a citizen contractor as defined by Section 2 of the Public Procurement and Asset Disposal Act, as it was wholly owned by Kenyan citizens and not a foreign contractor as posited by the 2nd Interested Party.

The Applicant in this regard annexed copies of the documents filed in respect of Request for Review Application No. 1 of 2019 and also annexed a copy of the Respondent's decision of 31st January 2019.

11. That, despite the foregoing, the Respondent proceeded to make a finding that the tender by the Applicant was unresponsive for reason of alleged discrepancies between the Applicant's Confidential Business Questionnaire Form (hereinafter "CBQ Form") and its CR12 form. It is the Applicant's case that the decision is *ultra vires* and in excess of the jurisdiction conferred upon the Respondent for reasons that the Evaluation Committee of the 1st Interested Party had found the tender to be responsive as per section 79 of the Public Procurement and Asset Disposal Act, and the Respondent acted *ultra vires* by substituting its decision for the decision of the Evaluation Committee.

12. The Applicant contended that the Respondent erroneously sat as the Evaluation Committee of the 1st Interested Party by re-evaluating the due diligence done by the 1st Interested Party and arriving at the decision that the Applicant's tender was unresponsive. That, the Respondent in essence usurped the power of the Evaluation Committee as provided under sections 46, 79, 80, 83 and 85 of the Public Procurement and Asset Disposal Act, and therefore acted in excess of its jurisdiction as provided under Section 173 of the Act.

13. The Applicant further contended that the impugned decision is also based on a grave misapprehension of the law, in that the Respondent misapprehended the provision of Section 83 of the Public Procurement and Asset Disposal Act, and clause 2.24 of the Appendix to instructions to tenderers on the reason for due diligence and went beyond the ambit of the requirement for due diligence. According to the Applicant, at the time of conducting due diligence it is considered that a successful tender as evaluated by an evaluation committee is fully responsive as having complied with mandatory requirements, and the subsequent due diligence is to confirm ability to perform contract for instance by ascertaining authenticity of references given by the successful tenderer. Therefore, by requiring due diligence to be conducted on a successful tenderer's responsiveness to tender and relying on Section 83 of the Public Procurement and Asset Disposal Act, the Respondent misapplied the law.

14. Equally, that by deeming the Applicant's tender as unresponsive and substituting its decision with that of the evaluation committee, the Respondent misapprehended the provision of the law as regards its jurisdiction. In addition, that the Respondent also misapplied the law in deeming the Applicant's tender as unresponsive on the basis of alleged discrepancies, contrary to section 79 of the Public Procurement and Asset Disposal Act which provides that minor deviations that do not materially depart from the requirements set out in the tender, or errors or oversights that can be corrected without affecting the substance of the tender, ought not to affect the responsiveness of a tender. That this is especially so considering that the Applicant explained in detail and gave information on the alleged discrepancy upon request by the 1st Interested Party, and the evaluation committee was satisfied with the explanation and information.

15. The Applicant further alleges that the said decision is premised on a misunderstanding of facts. It is averred that the first stage of the evaluation process as per the Tender was confirmation by the evaluation committee that a tender was responsive to mandatory requirements. Having considered the Applicant's tender, the Committee deemed it responsive and proceeded to evaluate the Applicant's bid. That, although the Tender provided for post qualification scrutiny, this was to verify and determine the Committee's satisfaction that the tenderer selected as

having submitted the lowest evaluated tender was qualified to perform the contract satisfactorily which determination was to take into account the tenderer's financial and technical capabilities. It is averred that the post qualification scrutiny as provided in the tender was not to reveal, unveil or verify details of directorship, shareholder and individuals who are directors of the Applicant, as was advanced by the Respondent in the impugned decision.

16. It is also contended by the Applicant that there was procedural impropriety in the making of the impugned decision, arising from the fact that the Respondent assumed jurisdiction and powers it did not have by sitting as the 1st Interested Party's evaluation committee, and substituting the decision of the committee with its own decision on the unresponsiveness of the Applicant's tender. Additionally, that the impugned decision is an abuse of power, as the Respondent conferred upon itself jurisdiction it did not have and made a finding contrary to law, facts and logic in its effort to disqualify the Applicant.

17. The Applicant further contended that the Respondent in reaching the impugned decision made considerations of irrelevant factors and failed to take into account relevant facts, and in particular that the evaluation committee was satisfied that the Applicant's tender was responsive and that the explanation given on the alleged discrepancies between the CR12 and the CBQ form had been explained. Furthermore, that the Respondent neglected to consider the due diligence done by the Committee, and yet it agreed that due diligence was conducted in accordance with Section 83 of the Public Procurement and Asset Disposal Act.

18. In addition, that the Respondent failed to consider that the alleged discrepancies between the details in the CR12 and the CBQ were explained and corrected at its directive by the 1st Interested Party without altering the substance of the tender, and were a minor deviation which did not materially depart from the requirements set out in the tender. Thus, that the Respondent failed to consider that there was no false information given on the CBQ form. Lastly, that the Respondent failed to consider that CR12 was only *prima facie* evidence of directorship and shareholding, and other evidence such as a company's resolution could be produced to confirm the status of directorship and shareholding, as was done in the instant case.

19. The Applicant faulted the impugned decision for being irrational and unreasonable, and one incapable of being arrived at by any person having cognizance of the law and facts as espoused above. The reasons given in the foregoing were reiterated in this regard. Lastly, it is the Applicant's case that the Respondent delved into the arena of being partisan and showed open bias against the Applicant by going out of its way to make a decision in total disregard to fact and law; and by questioning the propriety of the Applicant's documentation provided to the evaluation committee, yet none of the interested parties raised an issue with the said documents or explanation by the Applicant.

20. It is contended that the impugned decision is an affront to the Applicant's constitutional rights as espoused under Article 47 and 50 of the Constitution, for reasons that the Respondent purported to raise issues not raised by any party in the proceedings before it. To wit, the Respondent questioned the authenticity and legality of the Board resolution provided by the Applicant when the same was not raised before it, and was not an issue for determination before the Respondent. Further, that even in the absence of contrary evidence to rebut the said resolution and the intended effect of transferring shares to specific directors, the Respondent held that there was no evidence to controvert the CR12 records.

21. It was therefore contended that the impugned decision should be declared illegal, void and unconstitutional, for reasons that the Respondent has abused its powers and acted in a manner that is arbitrary, ultra vires, illegal and irrational.

The 1st Interested Party's Case

22. The 1st Interested Party was in support of the instant application. It averred that following orders given by the Respondent, it conducted a fresh due diligence to on the Applicant with an end to establishing whether the Applicant was a citizen contractor, to determine whether the Applicant needed to register a joint venture agreement, to clarify the discrepancies in details given by the Applicant in the CBQ Form and the CR12 records from the Companies Registry; and to verify the authenticity of the letters of reference issued to the Applicant.

23. To this end, the Applicant and its confidential referees, upon the Authority's request, provided:

- a) Confirmation by confidential referees that the reference letters were authentic;
- b) Details of shareholding of KAPS Holdings (Mauritius) Limited and details of shareholders and Directors of the Applicant showing that KAPS Holdings (Mauritius) Limited was wholly owned by Kenyan citizens;
- c) Resolution by KAPS Holdings (Mauritius) Limited dated 28th July 2017 authorizing the allotment of shares to the directors that had been listed in the CBQ Form submitted by the Applicant;
- d) An explanation as to why the said resolution had not been reflected on the CR12 by the time of submitting the tender documents.

24. According to the 1st Interested Party, the CBQ Form submitted by the Applicant listed Eric Mwandia, Samuel Kahiga, E.G Anzeze and G. Wangong'u as Directors who were citizens by birth, each holding one (1) share. Further, the CR12 Form issued by the Registrar of Companies as at 26th July 2018 (the date of Tender opening) listed KAPS Holdings (Mauritius) Ltd as a shareholder with 13917 Ordinary Shares with Eric Mwandia, Samuel Kahiga, and E.G Anzeze as Directors with no shareholding while G. Wangong'u is listed as a Director shareholder with one share. It is contended that in the CBQ Form, Part 2(c), bidders were required to give details of all directors, their nationality, citizenship details and shares. That, the Applicant's CBQ Form did not list KAPS Holdings (Mauritius) Limited, notably because it is not a Director in the Applicant. Therefore, the information supplied by the Applicant was substantively consistent with the information contained in Form CR12.

25. It is the 1st Interested Party's averment that it sought clarity in the minor discrepancy with respect to the Directors' shareholding between

the CBQ Form and Form CR12 from the Applicant, which vide its letter dated 9th November 2018, offered a satisfactory explanation to the Authority's Tender Evaluation Committee. In addition, that, the individuals named in the CBQ Form were the same individuals whose names appeared in Form CR12. That, having concluded the fresh due diligence report, the 2nd Interested Party nevertheless filed another review with the Respondent seeking nullification of the award.

26. The 1st Interested Party reiterated that its fresh due diligence was informed by the information available to it at the material time, and that the contents of the CBQ Form and Form CR12 dated 26th July 2018 were substantively consistent, hence the evaluation committee was satisfied that the Applicant's tender was responsive. That, the alleged discrepancies between the details in the CR12 and CBQ form was a minor deviation which did not materially depart from the requirements set out in the tender, and the law required that tenders with such minor deviations be treated as responsive.

The 2nd Interested Party's Case

27. The 2nd Interested Party contended that it submitted its bid for the subject tender herein, and was aggrieved by the 1st Interested Party's decision to award the tender to the Applicant. Further, that it accordingly filed the first Request for Review before the Respondent and subsequently the second Request for Review after the conclusion of the fresh due diligence on the Applicant. According to the 2nd Interested Party, the Applicant, despite being cited as an interested party in the said Request for Reviews, never filed any affidavit to controvert the factual matters raised by the 2nd Interested Party, and filed a bare response and written submissions.

28. The 2nd Interested Party further contended that the Respondent observed all laid down procedures in the Public Procurement and Asset Disposal Act, and accorded all parties equal opportunity to present their cases in both Requests for Review, and that the Applicant fully participated in the proceedings and did not at any material time object to the Respondent's jurisdiction. Further, that the Applicant accepted the decision of the Respondent dated 25th October 2018, and never appealed against the same. It is contended that the Applicant has never given any reason for filing incorrect information on its directorship, considering the penalty imposed under Section 55(5) of the Public Procurement and Asset Disposal Act.

29. Additionally, that the Applicant never served the 2nd Interested Party with the documents it purports to have supplied the 1st Interested Party during the ordered evaluation process. Consequently, it had no opportunity to comment on the same at the hearing before the Respondent. Further, that the official record of form CR12 supplied by the Registrar of Companies both on 16th October 2018 and 9th January 2019 contain the same information of Directors and share ownership, contrary to the documents submitted by the Applicant in support of its directorship and share ownership, and that the 1st Interested Party's action of receiving fresh documents from the Applicant other than the one filed when the tender closed on 26th July 2018 was contrary to the provisions of Section 76(2) of the Public Procurement and Asset Disposal Act.

30. Lastly, it is the 2nd Interested Party's case that the Applicant is stopped by his own conduct from challenging the Respondent's statutory powers in arriving at its decision, since in the tender document bidders were cautioned from giving false information. That, the Applicant acted contrary to the tender document and was legally and lawfully disqualified pursuant to section 55(5) of the Public Procurement and Asset Disposal Act. Furthermore, that the Applicant hands are therefore unclean and it does not deserve the mercy of the Court.

The Determination

31. I have considered the pleadings, submissions and arguments made by the parties, and note that a preliminary issue was raised by the 2nd Interested Party as to the non-joinder of the 1st Interested Party's Managing Partner as a party to this application. Mr. Oyugi in his oral submissions urged that the person who represented the procuring entity at the Respondent was the Managing Director of the 1st Interested Party, in compliance with section 170 of the Public Procurement and Asset Disposal Act, and that as the proceedings in this Court emanate from the proceedings before the Respondent, the Applicant left out a necessary party. Reliance was placed on the decision in **El Roba Enterprises & 5 Others vs James Oyondi t/a Betoyo Contractors & 5 Others (2018) e KLR.**

32. Mr. Ngatia SC in his oral submissions on the other hand urged that the procuring entity is set up as a corporate body under section 3 by the Kenya Airports Authority Act, and its Managing Director is a mere functionary of the Applicant, and adding him to the suit would not change the legal effect of the provisions of section 3. Furthermore, that section 170 of the Public Procurement and Asset Disposal Act is only applicable to parties to a review before the Respondent and not the High Court, which is regulated by section 175 of the Act which provides that any person aggrieved by the decision of the Respondent can move the High Court. Mr. Ngatia SC pointed out that in **El Roba Enterprises & 5 Others vs James Oyondi t/a Betoyo Contractors & 5 Others (supra)**, the Judge was clear and emphasised that the matter and his decision concerned the proceedings before the Respondent.

33. The Applicant's arguments were also reiterated by Mr. Wakwaywa for the 1st Interested Party, who stated that the preliminary objection is based on a misapprehension of the law.

34. I have perused section 170 of the Public Procurement and Asset Disposal Act, which provides for the parties to a review that is filed before the Respondent as follows:

- (a) the person who requested the review;
- (b) the accounting officer of a procuring entity;
- (c) the tenderer notified as successful by the procuring entity; and

(d) such other persons as the Review Board may determine.

On the other hand, the section which applies to judicial review applications made to this Court is section 175 of the Act, which has no similar requirements as regards parties to an application.

35. A plain reading of the section 175, as well as the application of the *expressio unius est exclusio alterius* (to express one thing is to exclude another) principle in the construction of words and phrases of a statute, leads to the conclusion that the parties in section 170 are not necessarily intended in judicial review applications brought before this Court, which can be brought by any person aggrieved by a decision made by the Respondent.

36. In addition, having joined the procuring entity as a party to this application, no value would be added by the joinder of its Managing Director, whose role in the procurement process as accounting officer was in the capacity of an agent of the 1st Interested Party. It is also pertinent that the 1st Interested Party as a corporation has legal capacity to sue and be sued under the Kenya Airports Authority Act. Lastly, the decision in **El Roba Enterprises & 5 Others vs James Oyondi t/a Betoyo Contractors & 5 Others (supra)** is distinguished on the ground that it did not involve proceedings before this Court, but proceedings before the Respondent, where section 170 rightly applies. The preliminary objection therefore fails.

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

- a) Whether the Respondent's decision made on 31st January 2019 to declare contents of the Applicant's Confidential Business Questionnaire (CBQ) Form to be false and the Applicant's bid as unresponsive was *ultra vires*.
- b) Whether the Respondent made the said decision in error of the law.
- c) Whether the Applicant merits the relief sought.

38. It is imperative at the outset to delineate the parameters of this Court's powers in judicial review. 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)."

39. 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."

40. 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.*

41. Consequently there are now established grounds for judicial review that require Courts 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.

42. It is in the context of the foregoing legal parameters that this Court will proceed to address the issues raised in this application

On Whether the Respondent's decision was ultra vires

43. On the first issue as to the legality of the Respondent's decision, Mr. Ngatia SC laid a basis for the Applicant's submissions, and pointed to the principles that underlie public procurement as set out in section 3 of the Procurement and Asset Disposal Act, including maximisation of value for money, good governance and prudent use of public finance. He also set out various common grounds in the instant application, including that the best financial tender was that of Endeavour Ltd which was disqualified for giving false information, followed by the Applicant's and then the 2nd Interested Party. That the Applicant's largest shareholder was found to be citizen contractor, and that the Respondent found that due diligence was carried out carried out by the 1st Interested Party's evaluation Committee. Therefore that any subsequent steps taken by the Respondent after these findings were *ultra vires* and unnecessary.

44. The specific arguments made in this regard by the Applicant were that under section 173 of the Public Procurement and Asset Disposal Act, the Respondent's jurisdiction is limited only to the decisions of the Accounting officer and not the Evaluation Committee. Further, that under the Act evaluation of bids is the exclusive mandate of the Evaluation Committee and not the Accounting Officer. The Applicant relied on the case of **Public Procurement Administrative Review Board & 3 Others, Ex-parte Central Bank of Kenya & 2 Others [2018] e KLR** where it was held that **the powers to deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it are reserved to the Evaluation Committee set under section 46(4)(a), and the role of the of the Accounting Officer is to implement the decision of the Evaluation Committee** Further, that the powers of substitution given to the Review Board are now restricted to the decision of the Accounting Officer.

45. It was therefore submitted that the Respondent wandered out of its jurisdiction in purporting to substitute the said Committees' decision with that of its own. The Applicant cited the case of **Alice Mweru Ngai vs Kenya Power & Lightning Co. Ltd [2015] eKLR** for this position, as well as the case of **Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited [1989] KLR 1** for the position that where 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; except where the court or tribunal has been given power to determine conclusively whether the facts exist. It is their submission that in any event, and as correctly appreciated by the Respondent, its power to substitute the Accounting Officer's decision with its own is greatly limited and can only be exercised in very "exceptional circumstances".

46. The Applicant submitted that based on the aforesaid illegal finding, the Respondent purported to declare the Applicant's bid "unresponsive" on the ground that the "post-qualification scrutiny ought to have revealed and verified the directors, shareholders and the individuals who are both directors and shareholders of both KAPS Limited." That, by the aforesaid decision, the Respondent usurped the powers of the procuring entity's Evaluation Committee in the absence of any legal justification.

47. The 1st Interested Party also reiterated in its submissions that the Respondent acted in excess of its jurisdiction and that the impugned decision is *ultra vires*. It submitted that Section 173 of the Public Procurement and Asset Disposal Act confers upon the Respondent jurisdiction limited to annulling the decision of an Accounting Officer of a procuring entity. That sections 46, 79, 80, 83 and 85 of the Public Procurement and Asset Disposal Act confer upon the Evaluation Committee of a procuring entity the power to evaluate the technical and financial aspects of a procurement including the responsiveness of tenders as per Section 70 of the said Act.

48. Therefore, that by determining that the tender by the Applicant was unresponsive for reason of alleged discrepancies between the CBQ Form and the CR12, when the Evaluation Committee of the Authority had found the tender to be responsive as per section 79 of the Public Procurement and Asset Disposal Act, the Respondent acted *ultra vires* and in excess of its jurisdiction. It is submitted that the Respondent usurped the power of the Evaluation Committee, particularly in view of section 79 (2) of the Act which provides that a responsive tender shall not be affected by minor deviations. That, the law grants the evaluation committee to disregard such minor deviations when determining responsiveness of any tender. The 1st Interested Party also extensively quoted from the case of **Public Procurement Administrative Review Board & 3 Others Ex Parte Central Bank of Kenya & 2 Others (supra)** in support of its arguments.

49. The 2nd Interested Party on its part submitted that the Respondent is established under Section 27(1) of the Public Procurement and Asset Disposal Act, and its functions are outlined under Section 28 of the Act. Further, that section 28(a) stipulates that the powers of the Respondent are not limited when hearing and determining tendering and disposal disputes. Therefore, that the allegations made by the Applicant lack merit and are untenable in law, as the Respondent's jurisdiction extends beyond section 173 of the Act. The 2nd Interested Party cited the Court of Appeal in **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others [2012] e KLR** that the Respondent is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It is therefore submitted that the Applicant's averment that the Respondent usurped the powers of the 1st Interested Party's Evaluation Committee is misconceived and has no statutory backing.

50. The 2nd Interested Party also cited case law highlighting laid down principles to be followed when determining an application for judicial review pursuant to section 75 of the Public Procurement and Asset Disposal Act. The cardinal principle, it submitted, is that judicial Review is about the decision making process and not the decision itself, as held in **Kenya Pipeline Company Limited vs Hyosung Ebara Company Limited & 2 Others, [2012] eKLR**. Therefore, that since the Applicant participated in both Requests for Review and was

accorded the opportunity to present its case, and has not alleged any violation of procedure and rules of natural justice, it is bound by the decision made by the Respondent pursuant to the provisions of Section 175 of the Public Procurement and Asset Disposal Act, and is consequently stopped from challenging the jurisdiction of the Respondent.

51. Regarding the authorities relied upon by the Applicant, it is submitted that none of those authorities limits the jurisdiction of the Review Board when dealing with matters of review of the tendering process. That in any case, the said authorities are distinguishable from the facts of the instant case and are not applicable. Further, that the Applicant deliberately neglected to address section 28(B) of the Act which gives the Review Board wide powers in matters of tendering and asset disposal disputes. Therefore, that the Applicant's interpretation of Section 173 of the Public Procurement and Asset Disposal Act is wrong and holds no legal basis.

52. I have considered the arguments made by the parties herein, and it is necessary at this stage that the impugned decision is clarified and put in context. The decision that is the subject of this application is not the entire decision by the Respondent that was made on 31st January 2019, but a portion of the said decision. This portion of the decision arose from earlier orders that had been given by the Respondent in its decision of 25th October 2018 on the first Request for Review, for the 1st Interested Party to take fresh due diligence on the Applicant, and specifically *inter alia* on the discrepancies in the shareholding of the Applicant between information provided in the CBQ and CR12 records from the Companies Registry.

53. The disputed portion of the decision is as follows:

“The Board finds that the Confidential Business Questionnaire Form is one of the mandatory documents that determines the responsiveness of a bidder as required in clause 2.3.1 (viii) of Section II. Instructions to Tenderers of the Tender Document. It is not in dispute that the Confidential Business Questionnaire Form was part of the documents examined at face-value at the preliminary evaluation stage in which KAPS Limited was deemed responsive pursuant to clause 2.20.1 of Section II. Instructions to Tenderers of the Tenders Document. However, the Procuring Entity provide for post-qualification, scrutiny to verify documents submitted at the preliminary stage in accordance with clause 2.24 of Section II. Instructions to Tenderers of the Tender Document which provides that:-

“The Procuring Entity will verify and determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluation responsive tender is qualified to perform the contract satisfactorily.

The determination will take into account the tenderer financial and technical capabilities. It will be used upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 2.11.2, as well as such other information as the procuring Entity deems necessary and appropriate.”

From the above provision, the Board observes that post-qualifications scrutiny ought to have revealed and verified the directors, shareholders and the individuals who are both directors and shareholders of KAPS Limited as compared to the list provided under Part 2 (c) of the Confidential Business Questionnaire Form. It is evident that the Procuring Entity failed to establish this, given that glaring differences still exist even after conclusion of the second due diligence process. The Board finds the contents of the Confidential Business Questionnaire Form with respect to KAPS Limited's directorship with shareholding to be false and thus holds KAPS Limited bid unresponsive.”

54. The Applicant and 1st Interested Party have urged that in making this portion of the decision, the Respondent exceeded its jurisdiction on the decisions it can make under section 173 of the Act, which provides as follows

“Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;**
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;**
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;**
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and**
- (e) order termination of the procurement process and commencement of a new procurement process.”**

55. The Applicant and 1st Interested Party relied on the decision in **Public Procurement Administrative Review Board & 3 Others Ex Parte Central Bank of Kenya & 2 Others (supra)** that orders which the Respondent can give in a Request for Review are strictly those expressly provides for in section 173, which does not extend to annulling the decision of the procuring entity or its evaluation committee. While this may be the position as regards the kind of orders the Respondent may make, my view is that the powers and jurisdiction of the Respondent are provided by section 28 of the Act, and section 173 of the Act is a sub-set and elaboration of the powers that are contained in section 28. Section 28 provides for the functions and powers of the Respondent 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 gazetted by the Cabinet Secretary.

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

56. Therefore an ordinary interpretation of section 28 means that any tendering dispute can be the subject of a review before the Respondent, and which the Respondent can then hear and make a decision on, including whether or not a tender is responsive. The jurisdiction of the Respondent to hear a tender dispute and review a tender, including on the responsiveness of a tender, also has to be distinguished from the orders or remedies that the Respondent can give upon hearing such a dispute in request for review, which is the subject of section 173 of the Act. It is in this regard that the Court of Appeal observed as follows with regard to the jurisdiction and powers of the Respondent in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others** [2012] eKLR:

“...The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. The Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.”

57. In addition, it is notable that the actual orders made by the Respondent in its decision of 31st January 2019 were as follows:

“1. The Request for Review filed on 11th January 2019 in respect of Tender No. KAA/OT/JKIA/1343/2017-2018 for Installation, operation and Maintenance of an Automated Car Parking Management System at Jomo Kenyatta International Airport, Nairobi be and is hereby allowed in terms of prayer 1 only.

2. The Letter of award dated 3rd January 2019 awarding Tender No. KAA/OT/JKIA/1343/2017-2018 for Installation, operation and Maintenance of an Automated Car Parking Management System at Jomo Kenyatta International Airport, Nairobi to Kenya Airports Parking Services Limited be and is hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to conduct due diligence process on the bidder with the next best concession rate including the parking of an award in respect of Tender No. KAA/OT/JKIA/1343/2017-2018 for Installation, operation and Maintenance of an Automated Car Parking Management System at Jomo Kenyatta International Airport, Nairobi within fourteen (14) days from the date of this decision.

4. Each party shall bear its own costs in the Request for Review.”

58. Therefore strictly speaking, there was no decision made by the Respondent annulling the findings of the 1st Interested Party’s evaluation Committee, and the orders given were within the powers that the Respondent is given in section 173 of the Act. Therefore the Respondent acted within the scope of its powers both under section 28 and 173 of the Public Procurement and Asset Disposal Act, and the arguments by the Applicant and 1st Interested Party on the disputed portion of the decision, turn on the reasons for the Respondent’s decision and orders, and whether the said reasons were made in error of law or were irrational, and not on the Respondent’s jurisdiction per se. I shall now proceed to consider this issue.

Whether the Respondent’s Decision was made in Error of Law

59. I will on this issue address the arguments made by the Applicant as regards the Respondent’s decision being based on a misapprehension of the law and in particular section 83 of the Public Procurement and Asset Disposal Act, being unreasonable and irrational, and being predicated on extraneous matters. These arguments were inter related, and in determining whether or not the Respondent 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.

60. In addition, this Court is also guided by the expose on when errors of law will arise in decisions made by a public body, as expounded in **Halsbury’s Laws of England, 4th Edition** at paragraph 77 as follows:

“A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is

itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

61. The general rule on failure to take into account relevant considerations which is an aspect of illegality 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.

62. 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).

63. The Applicant in this regard argued that that the purpose for due diligence as provided in the tender and as read with section 83 of the Public Procurement and Asset Disposal Act, was not to ascertain details of directorship or shareholding which had been addressed at the time of determining responsiveness of a tender, but to confirm the ability of the successful tenderer to perform its obligations under the Tender hence the requirement that due diligence be conducted on a successful tenderer. According to the Applicant, at the time of conducting due diligence it is considered that a successful tender as evaluated by an evaluation committee is fully responsive as having complied with mandatory requirements and the subsequent due diligence is to confirm ability to perform contract for instance by ascertaining authenticity of references given by the successful tenderer.

64. In addition, that the Respondent held that the procuring entity's Evaluation Committee had conducted the second due diligence exercise in accordance with its directions in the decision delivered on 25th October 2018, the Tender document and section 83 of the Act. That, it is therefore unreasonable to the extent of irrationality and in defiance of logic for the Respondent to change tune within the same decision and disparagingly dismiss the contents of the CBQ, on whose basis the determination was made as false. It is submitted that no sensible tribunal applying its mind on the same would have arrived at the same conclusion as the respondent. The Applicant relied on the case of Republic vs Administrative Review Board Public Procurement & 2 Others Ex-Parte Hoggers Limited [2015] e KLR for the definition of irrationality.

65. Lastly, the Applicant submitted that the Respondent's decision was also predicated on extraneous matters. It is submitted that having held that the Applicant was a citizen contractor notwithstanding the alleged inconsistencies in its CR12 forms, the Respondent's use of the minor deviations to determine the responsiveness of the Applicant's bid was in violation of Section 79 of the Act, and were an irrelevant factor undeserving of consideration in the Respondent's decision. The Applicant cited the case of Republic vs Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] e KLR in this regard.

66. It was also submitted that the issue of validity of the Applicant's Board resolutions on re-allotment of shares was unpleaded and uncontested by the 2nd Interested Party, and that the Respondent introduced the issues *suo moto* in its decision, hence denying the Applicant an opportunity to address the Respondent specifically on the issue. The Applicant also relied on the case of Republic vs Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] e KLR for the position that fairness, transparency and accountability are core values of a modern society like Kenya, and the Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant.

67. The 2nd Interested Party on its part submitted that the tender Evaluation Committee, in total breach of the provisions of Section 55(5) and 83 of the Public Procurement and Asset Disposal Act, in defiance of the Respondent's observations in its decision of 25th October 2018, and in blatant disregard of the mandatory requirements of the tender document, made an award on 3rd January 2019 in favour of the Applicant. It is submitted that the Applicant has not, in the instant Application, as was the case in the two review applications, offered any reason as to why it gave false and inaccurate information in its CBQ Form contrary to the contents of the CR12.

68. The 2nd Interested Party reiterated that the Applicant never filed an affidavit to refute the 2nd Interested Party's allegations. Further, that the 1st Interested Party neither filed an affidavit nor a summary of its second due diligence report. Hence, the 2nd Interested Party had no occasion to comment or submit on the same, as well as the documents relied on by the Applicant to support the alleged changes effected on share ownership, which were similarly not served on the 2nd Interested Party, as found by the Respondent in its decision. It was submitted that the Applicant has attempted to rescue its tainted image by purporting to supply fresh documents contrary to Section 76(2) of the Public Procurement and Asset Disposal Act as it had no window to correct the falsehood it had presented in its CBQ Form vis-à-vis the CR12 form.

69. In determining this issue, this Court notes that It is not disputed that the 1st Interested Party was conducting the second due diligence of the Applicant in the context of section 83 of the Public Procurement and Asset Disposal Act, and the Respondent in its decision of 31st January 2019 also stated that the issue before it for determination was as follows:

“Whether the Procuring Entity conducted the second due diligence process on KAPS Limited in accordance with the Tender Document and Section 83 of the Act in reaching a decision to award the subject tender to KAPS Limited pursuant to the orders of the Board issued on 25th October 2018 in Request for Review Ni 149/2018 and 20th December 2018 in Notice of Motion Application no 149/2018

To address the above issue, the Board shall determine the following two sub-issues:-

b. Whether the Procuring Entity authenticated the letters submitted by KAPS Limited's professional references (being organization that KAPs Limited had rendered services to) in accordance with the Tender Document and Section 83 (2) of the Act; and

b. Whether the Procuring Entity authenticated the contents of the duly completed Confidential Business Questionnaire Form of KAPS Limited as compared with the CR 12 records at the Companies Registry. “

70. After consideration of the said issues, the Respondent then made a specific finding on the second sub-issue , which is the disputed decision herein, as follows:

“The Board finds the contents of the Confidential Business Questionnaire Form with respect to KAPS Limited's directorship with shareholding to be false and thus holds KAPS Limited bid unresponsive.”

71. It is therefore necessary when deciding whether the Respondent properly applied section 83 of the Public Procurement and Asset Disposal Act, to construe the scope of the section and its purpose. Section 83 provides as follows in this regard:

“(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

72. Due diligence is in this regard defined in **Black's Law Dictionary , Ninth Edition** at page 523 as “the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation” Diligence on the other hand is defined as “the attention and care required from a person in a given situation”.

73. This Court after considering the disputed portion of the Respondent's decision in light of the applicable law, finds that there were various illegalities that were committed by the Respondent. The first was an error of law whereby the Respondent applied the wrong provisions of the law to the second sub- issue. The law on due diligence is as stated in the foregoing provided by section 83, and does not include the issue of a tender's responsiveness. The guidelines on the responsiveness of a tender is provided for in section 79 of the Act which provides as follows:

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.

74. The time at which responsiveness of a tender is material is at the time of evaluation of the tender, and section 80 of the Act provides as follows in this regard:

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

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

75. It is evident that the legal provisions on due diligence under section 83 differ in material respect from those that apply to responsive tenders, both in spatial terms and also in qualitative terms. It must also be noted that the question as to whether or not a tender is responsive is one that goes to the formalities of the tender, while that of due diligence is one of capacity of the tenderer. This position is also stated in section 2.20 of the tender document on the preliminary examination and responsiveness and section 2.24 of the Tender document on post qualification verification. Different considerations will therefore apply in a consideration of whether the legal thresholds have been met, and to the extent that the Respondent conflated the two legal concepts in its decision by purporting to find the Applicant's tender non-responsive after the conduct of a due diligence, it committed a material error of law that rendered its decision unsustainable and illegal.

76. Secondly, this Court also finds that even if the noted discrepancies between the CBQ and CR12 were found to be material to the question of the Applicant's qualifications and capacity during due diligence, the proper legal question that needed to be answered is what is the purpose in law of the requirement as regards shareholding of directors in the CBQ, and whether the noted discrepancies would materially affect the performance of the tender. It is notable in this respect that section 79 of the Public Procurement and Asset Disposal Act and section 2.20 of the Tender document on the preliminary examination and responsiveness for this reason allows the procuring entity to disregard any minor deviations or errors in a tender document that will not substantially affect the substance or delivery of the tender.

77. Specifically on the shareholding of directors which was the discrepancy in issue between the CBO and CR12, section 55 of the Public Procurement and Asset Disposal Act on eligibility criteria to bid, section 59 of the Act which provides for limitation on contracts with a corporation, private company, partnership or other body in which a state or public officer has a substantial or controlling interest, and section 155 of the Act which provides for preferential treatment of firms where Kenyans are shareholders were relevant in determining any effect the discrepancy had on the Applicant's capacity. These requirements are also expressed in the award and evaluation criteria in the tender documents section 2.25 and Annex 2 respectively. These legal considerations, though relevant, were not addressed nor taken into account by the Respondent.

78. Lastly, the Respondent's finding in this regard was also irrational to the extent that it contradicted its own earlier findings. In this respect, when discussing the discrepancies, the Respondent observed and found as follows:

” Having compared the CR 12 records from the Companies Registry as at 26th July 2018 found at page 58 KAPS Limited's original bid and the other two CR 12 extracts from the Companies registry obtained from official searches by the Applicants and KAPS Limited with the contents of part 2 (c) of the duly completed Confidential Business Questionnaire Form of KAPS Limited, the Board observed the following:-

a. Samuel Macharia Kahiga, Eric Ndumbu Mwandia and Epainitus Anzrnze Galo are all indicated as directors who are shareholders holding one share each in the Confidential Business Questionnaire Form yet from all the three CR 12 extracts they are simply identified as directors who are non-shareholders.

To explain why the Confidential Business Questionnaire Form identifies Samuel Macharia Kahiga, Eric Ndumbu Mwandia and Epainitus Anzrnze Galo as directors who are shareholders holding one share each, Counsel for KAPS Limited submitted that the aforementioned individuals were allotted one share each for purposes of doing business in Kenya. The board has studied the Procuring Entity bundle of documents to ascertain this assertion and notes that having received a request from the Procuring Entity, KAPS Limited addressed a letter dated 14th December 2018 to the Procuring Entity attaching a copy of the Board of Directors of KAPS Holdings (Mauritius) Ltd's resolution dated 28th July 2017 which is found at Page of Volume 2 of the Procuring Entity's bundle of documents that was submitted to this board pursuant to Section 67 (3)(e) of the Act. The said resolution explains the authorization given to the board of directors of KAPS Holdings (Mauritius) Ltd to decide on allotment of shares that are held in KAPS Limited as follows:-

In this case, the board finds that the allotment of shares held in KAPS Limited by the Board of Directors of KAPS Holdings (Mauritius) Ltd was ineffective as KAPS Holdings (Mauritius) Ltd sought to allot shares already allotted to itself instead of transferring the same. Furthermore, the Board holds that any allotment of shares to KAPS Limited ought to have been done by KAPS Limited and not KAPS Holdings (Mauritius) Ltd.

Secondly, the Board makes the following observations:

b. Bonnyventure Ngala Saronge is included as a director in the CR 12 extract from the Companies Registry as at 21st January 2019 whereas he is not included in the other CR 12 extract from the Companies Registry as the 9th January 2019 and the CR 12 records from the Companies Registry as at 26th July 2018 which is found at page 58 of the KAPS Limited's original bid neither is he included in the contents of Part 2(c) of the duly completed confidential Business Questionnaire Form.

In an attempt to explain the foregoing difference, counsel for KAPS Limited submitted that Limited confirmed from its Company Secretary that by 16th November 2018, the changes to the CR 12 records obtained after the official search at the Companies Registry as at 21st January 2019 had not been effected.

In Judicial Review No. 424 of 2016, Republic v National Land Commission & 2 others Ex parte Magnate Ventures Limited, the court had the opportunity to explain the function that the CR 12 records at the Companies Registry serves as follows:-

“CR 12 is an official and legal confirmation or Certificate by the Registrar of Companies in Kenya indicating the details of the directors and shareholders of the company. In addition, it confirms that the company's records exist at the company registry.

Nonetheless, CR 12 I sonly but prima facie evidence of directorship and shareholding, and the contrary could be proved by other evidence...

From the foregoing case, the Board observes that it is only the Registrar of companies who is able to confirm a company's true position by indicating the details of directors and shareholders unless there is evidence to the contrary. The Board finds, the allegation that charges to KAPS Limited's shareholding were not supported by any evidence. The Board observes that the Applicant filed its Request for Review on 11th January 2019 and according to the Board's Secretariat Dispatch Register, a notice of the hearing was served on the parties on 16th January 2019. It is evident that KAPS Limited obtained the said CR 12 extract after the notice of the hearing of the Request for Review was served on all parties and no evidence was given by KAPS Limited show that the same was served on all the parties before the hearing date to afford them an opportunity to challenge the facts demonstrated in the said CR 12 extract. In the circumstances, the board holds that no evidence was provided by KAPS Limited in the form of allotment letters or share transfers to controvert the CR 12 records at the company registry."

79. This analysis was made after the Respondent had found as follows as regards the shareholding of the Applicant:

"From the foregoing, the Board observes that KAPS Holdings (Mauritius) Ltd has two directors and five shareholders who are Kenyan citizens. In addition to this, the Kenyan percentage in KAPS Holding (Mauritius) Ltd amounts to a total of 99.89%, of the total number of shares allotted to the five Kenyan citizens i.e 21,000 ordinary shares. The Board finds that KAPS Holding (Mauritius) Ltd is a citizen contractor within the meaning of section 2 of the Act, and it is fully owned and controlled by Kenyan citizens"

The evidence that was before the Respondent, and which it considered, in my view contradicts and does not support the reason given for the disputed decision, and specifically that glaring differences still existed even after conclusion of the second due diligence process, or that the contents of the Confidential Business Questionnaire Form were false. To the extent of these internal inconsistencies in the decision made by the Respondent, I find that the said decision was irrational, and particularly so given section 83 of the Act and the tender document under section 2.27 gave the procuring entity the discretion to consider any other relevant information during due diligence or a post-qualification verification.

Whether the Applicant is entitled to the relief sought

80. 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, (1997) e KLR *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."

81. The Applicant has sought orders of certiorari, mandamus and prohibition. This Court has found that in arriving at the disputed portion of the decision made on 31st January 2019, the Respondent acted in error of the law and irrationally, and did not take into account relevant factors. These errors of law also had the effect of rendering the final decision and orders of the Respondent untenable. The Applicant is therefore entitled to the orders sought of certiorari to quash the impugned decision by the Respondent.

82. The effect of the orders of certiorari once granted will be to restore the status to the position it was before the decision of 31st January 2019, and the award of the Tender by the 1st Interested Party to the Applicant will therefore still stand. It is my view that for this reason, the

orders sought of mandamus and prohibition are to this extent superfluous, and in any event this Court cannot direct the 1st Interested Party to award the contract to the Applicant in any particular manner, as there are provisions of the law that may still need to be complied with in this regard.

83. I accordingly find that the Applicant's Notice of Motion dated 15th February 2019 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 Respondent's decision dated 31st January 2019 made in Request for Review Application No 1 of 2019 - Mason Services Limited & Another vs the Managing Director Kenya Airports Authority & Another regarding Tender Number KAA/OT/JKIA/1343/2017-2018.

II. Each party shall bear its own costs of the Notice of Motion dated 15th February 2019.

84. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2019

P. NYAMWEYA

JUDGE