



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 299 OF 2018 AS CONSOLIDATED**

**WITH JUDICIAL REVIEW APPLICATIONS NO 296, 297 AND 301 OF 2018,**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,**

**AND**

**IN THE MATTER OF ARTICLE 10, 47(1), 50(1) AND 165(6) & (7) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26**

**AND**

**IN THE MATTER OF ORDER 53(1) OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTION 167, 175(1) OF THE PUBLIC**

**PROCUREMENT AND ASSET DISPOSAL ACT, 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

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

**AVENUE BUTCHERY.....2<sup>ND</sup> INTERESTED PARTY**

**EX- PARTE:**

**1. MINISTRY OF DEFENCE**

**2. PEEMA INVESTMENTS COMPANY LIMITED**

**JUDGMENT**

## **Introduction**

1. This Judgment is on four consolidated suits. Two of the suits, namely JR Application Nos 299 and 301 of 2018 (hereinafter the first set of suits), were filed by the Ministry of Defence, which is the 1<sup>st</sup> *ex parte* Applicant. Peema Investments Ltd., which is the 2<sup>nd</sup> *ex parte* Applicant, filed the remaining two suits (hereinafter the second set of suits), namely JR Application Nos 296 and 2917 of 2018. The 1<sup>st</sup> *ex parte* Applicant (hereinafter “the 1<sup>st</sup> Applicant”) was the procuring entity in the tender that is the subject of all the suits, being the Restricted Tender for Supply of Fresh Meat (Beef) on Bone to Eldoret Based Units (Tender No. MOD/423 (0110139)/2017-2018). The 2<sup>nd</sup> *ex parte* Applicant (hereinafter “the 2<sup>nd</sup> Applicant”) was a bidder in the said tender, and was the one awarded the tender.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants are both aggrieved with a decision made by the Public Procurement Administrative Review Board (PPARB), the Respondent herein, which was made on 10<sup>th</sup> July 2018 in PPARB Application No. 81 and 82 of 2018. 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. The impugned decisions of 10<sup>th</sup> July 2018 were on Requests for Review which had been lodged with the Respondent by Samno Company Ltd, the 1<sup>st</sup> Interested Party herein, and Avenue Butchery, the 2<sup>nd</sup> Interested Party herein. The 1<sup>st</sup> Interested Party was the applicant in PPARB Application No. 82 of 2018, and was also a bidder in Tender No. MOD/423 (0110139)/2017-2018, while the 2<sup>nd</sup> Interested Party was the applicant in PPARB Application No. 81 of 2018.

3. The 1<sup>st</sup> Applicant moved this Court by way of two Notices of Motion both dated 26<sup>th</sup> September 2018 in the first set of suits, in which it is seeking the orders of certiorari to remove to the High Court for purposes of quashing the determination and orders of the Respondent herein in PPARB Number 81 and 82 of 2018 dated 10<sup>th</sup> July 2018. The 2<sup>nd</sup> Applicant is seeking similar orders in an Amended Notice of Motion dated 25<sup>th</sup> April 2019. The 1<sup>st</sup> Applicant relied on Statutory Statement dated 23<sup>rd</sup> July 2018 and verifying and supporting affidavits sworn on 23<sup>rd</sup> July 2018 and 27<sup>th</sup> September 2018 respectively by Anne Nyakio Kamaru, its Procurement Officer. The 1<sup>st</sup> Applicant also filed a replying affidavit to the 2<sup>nd</sup> Applicant’s application sworn on 10<sup>th</sup> September 2018 by Major Vitalis Lumbasi, its Staff Officer II in charge of contracts. The 2<sup>nd</sup> Applicant on its part relied on an Amended Statement dated 25<sup>th</sup> April 2019, and a verifying affidavit sworn on the same date by Paul Waititu, who is its Director.

4. In response, the Respondent filed a replying affidavit sworn on 31<sup>st</sup> October 2018 by Henock Kirungu, its Board Secretary. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed joint Grounds of Opposition dated 17<sup>th</sup> September 2018 and 2<sup>nd</sup> October 2018 respectively in response to the 1<sup>st</sup> Applicant’s application. With respect to the 2<sup>nd</sup> Applicant’s application, the 1<sup>st</sup> Interested Party’s response was in two replying affidavits sworn on 4<sup>th</sup> September 2018 and 14<sup>th</sup> September 2018 respectively by one of its directors, Samuel Kiplagat Biwott. The 2<sup>nd</sup> Interested Party filed Grounds of Opposition dated 6<sup>th</sup> August 2018 as its response.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants applications were canvassed by way of written submissions. D. O. Odeny Advocate filed submissions dated 9<sup>th</sup> November 2018 on behalf of the 1<sup>st</sup> Applicant, while Onyoni, Opini & Gachuba Advocates filed submissions dated 14<sup>th</sup> January 2019 for the 2<sup>nd</sup> Applicant. The Respondent’s submissions were dated 9<sup>th</sup> November 2018, and filed by Munene Wanjohi, a state counsel in the Attorney General’s office. Lastly, Ham Lagat & Associates Advocates filed joint submissions for the Interested Parties dated 29<sup>th</sup> October 2018. I shall proceed to briefly state the parties’ respective cases, as distilled for their pleadings.

## **The 1<sup>st</sup> Applicant’s Case**

6. The 1<sup>st</sup> Applicant’s case is that the Respondent acted without jurisdiction, illegally and in error of the law, and irrationally. Firstly, on the issue of jurisdiction, that the Respondent acted in excess of its jurisdiction and illegally in entertaining the 1<sup>st</sup> Interested Party’s Request for Review in PPARB Application No. 82 of 2018 contrary to the provisions of section 167(1) of the Public Procurement and Asset Disposal Act 2015, for reasons that having found that the 1<sup>st</sup> Interested Party had not been notified of the outcome of the tender, the said Request for Review was therefore premature .

7. As regards the 2<sup>nd</sup> Interested Party’s Request for Review in PPARB Application No. 81 of 2018, that the Respondent also acted without jurisdiction by virtue of Section 28 (1) (a) and Section 167 of the Public Procurement and Disposal Act, 2015 as the 2<sup>nd</sup> Interested Party was neither a tenderer nor a candidate in Tender No. MOD/423(0110139)/2017/2018. In addition, that the alleged breach complained about by the 2<sup>nd</sup> Interested Party if any, took place outside the procurement process and was thus outside the jurisdiction of the Respondent.

8. The 1<sup>st</sup> Applicant in this respect averred that the 2<sup>nd</sup> Interested Party was not invited to bid in Tender No. MOD/423(0110139)/2017/2018 having not been prequalified. Further, that the 2<sup>nd</sup> Interested Party was the holder of a past tender, and that was adequately compensated for the days he did not supply through a supplementary contract entered between it and the 1<sup>st</sup> Applicant.

9. Further, that the Respondent acted in excess of its jurisdiction in entertaining the two applications which did not conform to the mandatory provision of regulation 73(2) of the Public Procurement and Asset Disposal Regulations, 2005 as the Interested Parties did not include the mandatory statements in the said applications. Still on the issue of jurisdiction, that the Respondent’s decision to direct the 1<sup>st</sup> Applicant to extend the contract No. MOD/423(011103)/2015/2016 with M/s Avenue Butchery’s which had lapsed on 5<sup>th</sup> June 2018 was *ultra vires* sections 167(1) and 173 of the Public Procurement and Asset Disposal Act, 2015.

10. Secondly, that the Respondent acted illegally and was procedurally unfair by considering issues that were not pleaded or raised by the parties, and originated issues *suo moto* and went ahead to make decisions on the same. That the process was procedurally unfair as the issues determined by the Respondent were not issues raised by the 1<sup>st</sup> interested Party, and Applicants was therefore not heard on the same contrary to the rules of natural justice.

11. In addition, that the Respondent made an illegal finding in deciding that the 1<sup>st</sup> Applicant's Head of Procurement cannot make, through its signed opinion, a recommendation contrary to the evaluation committees decision. That this decision was materially influenced by an error of law, as the mandate of the head of Procurement under sections 47(2), 80(4), 84 and 85 of the Public Procurement and Asset Disposal Act, 2015 is to review the evaluation report of the Evaluation Committee and to make recommendations thereof to the Accounting Officer. Furthermore, that the Respondent's decision was also materially influenced by an error of law as section 102(1) of the Public Procurement and Asset Disposal Act, 2015 permits the Accounting Officer to procure goods.

12. Lastly, that the Respondent's decision was irrational as it was not connected to the information and facts before it. The 1<sup>st</sup> Applicant annexed copies of the subject Tender's opening Register, the supplementary contract entered into with the 2<sup>nd</sup> Interested Party, the Respondent's impugned decisions in PPARB Application No. 81 and 82 of 2018, the Interested Parties' Requests for Review, and the responses thereto.

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

13. The grounds raised by the 1<sup>st</sup> Applicant hereinabove were also raised by the 2<sup>nd</sup> Applicant. The 2<sup>nd</sup> Applicant in its pleadings averred to additional grounds of errors of law committed by the Respondent. It was in this respect contended that the Respondent's decision was erroneous as sections 3(i), 57, 71, 102(1)(b)&(c) and 102(2) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 54(3) of the Public Procurement and Disposal Regulations, 2006 permitted the Accounting Officer to invite at least 10 suppliers from the list of restricted suppliers, and section 93 of the Act is limited to, and a precursor to the restricted tendering under section 102(1)(a) of the Act only. Further, that the restricted tendering was participatory, non-discriminatory and competitive.

14. It was the 2<sup>nd</sup> Applicant's case that the Respondent's decision was also erroneous as the mandate of the Evaluation Committee under sections 46(4)(a), 80(4), and 83 of the Public Procurement and Asset Disposal Act, 2015 is limited to evaluation and comparison of bids and due diligence. The 2<sup>nd</sup> Applicant also alleged that the Respondent took into consideration irrelevant considerations being the litigation and termination of the contract related to Tender No. MOD/423(011103)/2015/2016A in PPARB Application No. 81 of 2018.

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

15. The Respondent averred that on 19<sup>th</sup> June 2018 the 2<sup>nd</sup> Interested Party filed a request for review No. 81 of 2018 before the Respondent challenging the decision of the Principal Secretary, Ministry of Defence to advertise Tender No. MOD/423(0110139)2017/2018 for the supply of fresh meat (beef) to Eldoret Based Units. That upon receipt of the said Request for Review the Respondent served a copy of the same on the Applicants notifying them of the pending review as is required of it by Section 168 of the Public Procurement and Asset Disposal Act, 2015.

16. Further, that the Request for Review was subsequently heard and the Respondent considered the oral submissions made by the parties, and that in determining the Request for Review, the Respondent identified the following issues for determination: -

- a) Whether the 2<sup>nd</sup> Interested Party lacked *locus standi* to lodge the Request for Review on account of not having participated in the tender Contrary to the provisions of Section 167(1) of the Act thereby depriving the Board of Jurisdiction.
- b) Whether the procuring entity discriminated against the 2<sup>nd</sup> Interested Party by denying it an opportunity to participate in the subject tender contrary to the provisions of section 3 of the Act and whether the procurement process in respect of the said tender was lawful.

17. The Respondent also averred that on 20<sup>th</sup> June 2018 another Request for Review No. 82 of 2018 was filed by the 1<sup>st</sup> Interested Party, and it likewise afforded the parties an opportunity to file and urge their respective positions as pertains the tender in issue. That in making its decisions dated 10<sup>th</sup> July 2018, the Respondent was within its powers as provided for under section 173 of the Public Procurement and Asset Disposal Act, 2015. In addition, that the decisions were made within the confines of the law after a review of all material placed before it, and in line with its mandate to uphold competitive and cost effective public procurement processes.

18. According to the Respondent, the Applicants have not demonstrated that it was guilty of unreasonable exercise of power in arriving at its decisions, or that it was guilty of an illegality, impropriety of procedure or irrationality to warrant the variance of the orders made therein. The Respondent denied that it either failed to consider any relevant factors or that it considered irrelevant factors and relied on the record of its proceedings and findings. Lastly, the Respondent contended that the Applicants are challenging the merits its decisions, albeit disguised as a judicial review application.

### **The Interested Parties' Case**

19. The Interested Parties in their grounds of opposition alleged that the Procuring entity engaged in a flawed procurement process, and has moved this Court with unclean hands as it violated section 5 of the Fair Administrative Actions Act when its Head of Procurement ignored the recommendations of the technical evaluation committee. Further, that the Applicants have not laid a basis for the orders they seek, and are also guilty of abuse of process for filing multiple applications over the same subject matter. The Interested Parties also stated that the Respondent rightly performed its statutory duty of review, fairly heard all the parties, and that its decision dated 10<sup>th</sup> July 2018 was legal and fair.

20. The 2<sup>nd</sup> Interested Party averred in its replying affidavits that the procurement process adopted by the procuring entity was that of a restricted tender, and did not meet the threshold set out in sections 93 and 102 of the Public Procurement and Assets Disposal Act, as it did not carry out a prequalification, its accounting officer did not notify tenderers whose tenders were not successful nor the reasons thereof,

and the Head of Procurement changed the recommendations of the evaluation committee and awarded the tender to another entity without due process. It was also contended that the 1<sup>st</sup> Interested Party had *locus standi* to file a Request for Review before the Respondent as it is the current supplier of the 1<sup>st</sup> Applicant. Lastly, the 2<sup>nd</sup> Interested Party reiterated that the Respondent's review was in accordance with sections 167 to 173 of the Public Procurement and Asset Disposal Act of 2015.

### **The Determination**

21. I have considered the pleadings, submissions and arguments made by the parties, and the substantive issues arising for determination are as follows:

- a) **Whether the Respondent had jurisdiction to consider the Request for Review by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in PPARB Application No. 81 and 82 of 2018. If the Court finds in the affirmative, it will then proceed to consider the two other substantive issues namely:**
- b) **Whether the Respondent made the said decisions dated 10<sup>th</sup> July 2018 in PPARB Application No. 81 and 82 of 2018 in error of the law.**
- c) **Whether the Applicants merit the relief sought.**

22. 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).”**

23. 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.**

24. 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 had Jurisdiction**

25. The 1<sup>st</sup> Applicant's submissions on the issue of the Respondent's jurisdiction were that under section 167 of the Public Procurement and Asset Disposal Act 2015 (hereinafter “the Act”), only candidates and tenderers are entitled to move the Respondent for review, and that the 2<sup>nd</sup> Interested Party was not a candidate as it had not obtained tender documents from the procuring entity, neither was it a tenderer as it had not returned any tender documents. Further, that the finding by the Respondent that the 2<sup>nd</sup> Interested Party had sufficient interest in the subject matter of the tender was outside the provisions of section 167(1) of the Act. Reliance was placed on the decision in **Republic vs Public Procurement Administrative Review Board ex parte Team Engineering Spa (2014) e KLR** for this interpretation of section 167.

26. Similar arguments were made by the 2<sup>nd</sup> Applicant who in turn cited the decision in **Republic vs Independent Electoral and Boundaries Commission & Another ex parte Coalition for Reform and Democracy & 2 Others, (2017) e KLR** for its position. The 2<sup>nd</sup> Applicant further argued that the 2<sup>nd</sup> Interested Party grievance before the Respondent was that the procuring entity used restricted tendering as opposed to open tendering, and that section 167(4)(a) of the Act bars the Respondent from entertaining Requests for Review that challenge the choice of procurement method.

27. As regards the 1<sup>st</sup> Interested Party's Request for Review, the 1<sup>st</sup> Applicant relied on the decision in **Republic vs PPRB ex parte Crane**

**AB, Misc. Civ Appl. No 6 of 2018** for the submission that the Respondent having found that the 2<sup>nd</sup> Interested Party was not notified of the review, then the 1<sup>st</sup> Interested Party's application before it was premature and it ought to have declined jurisdiction. The 2<sup>nd</sup> Applicant on the other hand submitted that the 1<sup>st</sup> Interested party's application was time barred as it was filed on 20<sup>th</sup> June 2018, after 14 days of the lapse of the tender.

28. The Respondent did not address this issue in its submissions. The Interested Parties submitted that they were candidates and tenderers within the meaning and context of section 167(1) of the Act, and did suffer or risked suffering loss or damage. Reliance was placed on the decision in **Republic vs PPARB ex parte KPA Limited and 2 Others, (2017) e KLR** for the position that an interpretation of section 167(1) should be in a manner that favours enforcement of fundamental rights and freedoms, and that section 167(1) of the Act ousts the jurisdiction of the Respondent contrary to section 227 of the Constitution. The Interested Parties also submitted that they filed their Requests for Review timeously and within 14 days as required by the Act.

29. In deciding this issue, this Court is guided by the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

**“**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32. It is not disputed in the instant application that the applicable law on the issue of the Respondent's jurisdiction is section 167(1) of the Act. A plain reading of the section shows that it is only a candidate or tenderer who can bring an application for review before the

Respondent. A candidate is defined under section 2 of the Act to mean a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity; while a tenderer is defined as a person who submitted a tender pursuant to an invitation by a public entity. It is not disputed that the 1<sup>st</sup> Interested Party submitted a bid for Tender No. MOD/423(0110139)2017/2018, as also shown in the tender opening register that was annexed by the 1<sup>st</sup> Applicant. Therefore, the Respondent correctly assumed jurisdiction over the 1<sup>st</sup> Interested Party.

33. On the arguments made that the Respondent had no jurisdiction over the 1<sup>st</sup> Interested Party's application on account of its finding that the procuring entity failed to serve it with a letter of notification on the outcome of the tender, and that the 1<sup>st</sup> Interested Party's Request for Review was time barred, it is notable that there are two instances when time will start to run for purposes of filing a request for review with the Respondent that are provided by an ordinary reading of section 167 (1) of the Act. These are the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process.

34. A reading of the grounds in the 1<sup>st</sup> Interested Party's Request for Review which was annexed by the 1<sup>st</sup> Applicant, shows that the breach alleged by the Interested Party is that the subject procurement did not meet the threshold expressed under sections 3 and 88 of the Act and proceeded to give particulars thereof. Therefore, the relevant act when time started to run for purposes of the Interested Party's Request for Review was the time the procurement process ended, which it stated was when it received a notification from the Respondent inviting it to attend the hearing of the 2<sup>nd</sup> Interested Party's Request for Review in PPARB Application No. 81 of 2018, which was filed with the Respondent on 19<sup>th</sup> June 2018. The 1<sup>st</sup> Interested Party filed its Request for Review in PPARB Application No. 82 of 2018 on 20<sup>th</sup> June 2019. It is the finding of this Court therefore, that the 1<sup>st</sup> Interested Party filed its Request for Review within 14 days of its knowledge of the alleged breach by the procuring entity, upon being served with the 2<sup>nd</sup> Interested Party's Request for Review which was filed on 19<sup>th</sup> June 2018.

35. In determining the date of occurrence of this breach, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 the Court extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

**“...In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in Uniplex which I wish to emphasise are paragraphs 30 and 31:**

**“30. However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.**

**31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings. “**

**I accept that the question under reply by the Court of Justice only required the Court to decide whether the three month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three month period.**

**The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can “come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings” reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough...”**

36. In addition, the findings by the Respondent on the lack of notification of the award to the 1<sup>st</sup> Interested Party were therefore of no significance in the present application as regards whether the Respondent had jurisdiction thereby, as the notification of the award was not the relevant act as regards when time started to run.

37. The position is however different in relation to the Respondent's jurisdiction as regards the 2<sup>nd</sup> Interested Party's Request for Review in PPARB Application No. 81 of 2018. A perusal of the Request for Review shows that the 2<sup>nd</sup> Interested Party's grievance arose from contracts entered into with the 1<sup>st</sup> Applicant on 7<sup>th</sup> December 2016 and 15<sup>th</sup> June 2017, and on which there was pending litigation, and it is also not disputed that it did not participate in the procurement processes for Tender No. MOD/423(0110139)2017/2018

38. When the issue of the 2<sup>nd</sup> Interested Party's *locus standi* to bring the Request for Review in PPARB Application No. 81 of 2018 was raised as a preliminary objection, the Respondent expressly found that the 2<sup>nd</sup> Interested Party was not a candidate nor a tenderer within the meaning of section 167(1) of the Act, and was therefore not ordinarily entitled to bring an application before it. At this point, the Respondent ought to have downed its tools. It however went on to explore the unique circumstances of the 2<sup>nd</sup> Interested Party arising from its contract with the 1<sup>st</sup> Applicant, which in its view gave it sufficient interest in the subject matter of the tender, as the contract was still in force and the 2<sup>nd</sup> Interested Party was the 1<sup>st</sup> Applicant's current supplier. The Respondent accordingly assumed jurisdiction on this ground.

39. The Respondent therefore assumed jurisdiction not given to it by law, and in this instance, its jurisdiction as regards requests for review is circumscribed by section 167(1) of the Act only to Requests for Review by candidates and tenderers. It has no power or discretion to add any other grounds of jurisdiction or extend the facts to which it can assume jurisdiction as explained in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [supra]**. The issue of whether or not the 2<sup>nd</sup> Interested Party had sufficient interest is only relevant in judicial review proceedings before this Court, and not in a Request for Review before the Respondent, which, being a statutory body must act within the four corners of the law. Its decision that it had jurisdiction over the 2<sup>nd</sup> Interested Party's Request for Review in PPARB Application No. 81 of 2018 was therefore blatantly *ultra vires*, and its decisions therein were illegal, null and void.

#### ***On Whether the Respondent's decision was in error of law***

40. The outstanding issues for determination are therefore only with respect to the Respondent's decision in 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, given that the Respondent had no jurisdiction to determine the issues raised in PPARB Application No. 81 of 2018. As regards the errors of law committed by the Respondent in its decision in PPARB Application No. 82 of 2018, the 1<sup>st</sup> Applicant submitted that the directive by the Respondent to extend a contract that had lapsed amounted to an award of a new contract, which is not supported by law and is contrary to section 139(1) of the Act. Further, that the Respondent usurped the powers of the evaluation Committee under section 139(2) to recommend an extension of a contract period.

41. The 2<sup>nd</sup> Applicant on its part submitted that the 1<sup>st</sup> Applicant's procurement procedures are governed by Part VIII of the Act on Classified Procurement Methods and Procedures, which does not require prequalification of suppliers. Further, that the procedure is as provided for under section 90(5) and (6). In addition, that even if section 102 of the Act is applicable, it permits the Accounting Officer to procure goods, and the 1<sup>st</sup> Applicant therefore acted lawfully by inviting ten suppliers to submit bids. The 2<sup>nd</sup> Applicant also contended that it is only procurements under section 120(1)(a) that are required to be preceded by a prequalification of suppliers. That in that regard, procurement of meat on bone cannot be held to be a specialised or complex procurement to require a prequalification of suppliers.

42. The 2<sup>nd</sup> Applicant further submitted that under section 84 as read with section 47(2) of the Act, the Head of Procurement is required to review the evaluation report and provide a professional opinion, and section 84(3) makes it mandatory for the Accounting Officer to take into account this professional opinion. Further that under section 85, the recommendations by the Head of Procurements inform the award decision. Therefore, that the Head of Procurement's professional opinion was lawful and correct, and that the Accounting Officer acted lawfully in awarding the tender in accordance with his recommendation.

43. The Respondent submitted that it acted within its powers and mandate under section 173 of the Act in granting the subject orders, and that this Court being a judicial review Court is not empowered to correct the decision on merit. The Respondent proceeded to make lengthy submissions on the extent of this Court's jurisdiction.

44. The Interested Parties submissions centered around the 2<sup>nd</sup> Interested Party's legitimate interests in relation to the provisions on restricted tendering, and the grounds its raised in its Request for Review in PPARB Application No. 81 of 2018, which this Court has found could not be legally and properly raised before the Respondent for want of jurisdiction.

45. 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.

46. 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, 4<sup>th</sup> 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.”**

47. It is in this regard notable that the Respondent's decision in was based on the procuring entity's concession that its Accounting Officer invited ten (10) bidders to collect tender documents, and that there was no prequalification exercise undertaken to identify the ten bidders. The Respondent found that in a restricted tendering such as the one carried out by the procuring entity, a proper prequalification must be carried out. It also found that that the head of procurement cannot change the recommendation of an award made by a tender evaluation committee as happened in the subject procurement.

48. Section 93 of the Act provides as follows as regards the requirement of prequalification:

**“(1) Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-**

qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.

(2) Pre-qualification shall be for complex and specialized goods, works and services.

(3) In conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified....”

49. Section 102 of the Act is specifically on restricted tendering and states as follows:

“(1) An accounting officer of a procuring entity may use restricted tendering if any of the following conditions are satisfied

(a) competition for contract, because of the complex or specialised nature of the goods, works or services is restricted to prequalified tenderers resulting from the procedure under section 94;

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; or

(c) if there is evidence to the effect that there are only a few known suppliers of the whole market of the goods, works or services;

(d) an advertisement is placed, where applicable, on the procuring entity website regarding the intention to procure through limited tender.

(2) An accounting officer of a procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.”

50. The 2<sup>nd</sup> Applicant has urged that these provisions did not apply to the procuring entity in the subject procurement, and that the applicable sections as regards the procedure to be followed was section 90 of the Act, which applies to procurement of classified items and provides as follows:

“(1) For the avoidance of doubt, the provisions of this Act shall also apply to all state organs and public entities including the national security organs as established under the Constitution and any other legislation.

(2) National security organs and other procuring entities that deal with procurements of classified nature shall manage their procurements and disposals on the basis of a dual list maintained by the respective procuring entity as prescribed.

(3) Procuring entities other than national security organs referred to under subsection (1), that procure classified items shall request the Cabinet Secretary for approval of the classified list of items annually.

(4) The dual list shall distinguish items subject to open and to classified procurement and disposal proceedings respectively.

(5) Procuring entities that deal with classified items shall agree annually with the Cabinet Secretary on the category of classified items to be included in the classified list of procurements or disposals to be applied.

(6) The Cabinet Secretary shall submit the list of classified items to Cabinet for approval.

(7) Any person carrying his or her duties or responsibilities under this section shall maintain confidentiality and shall not disclose any information that may otherwise compromise national security.

(8) A person who in order to avoid open tendering, procures items that ought to be subjected to open tendering as though they were included in the list of classified items commits an offence.”

51. However, the 2<sup>nd</sup> Applicant did not provide any evidence to show that the item that was the subject of the impugned procurement, which was meat on bones, was in an approved list of classified items as required by section 90, and this section is therefore not applicable. It is this Court’s finding that as it is not disputed that the 1<sup>st</sup> Applicant employed restricted tendering in Tender No. MOD/423 (0110139)/2017-2018, section 93 of the Act was applicable, as the section applies where the method of procurement being employed by a procuring entity is not open tendering.

52. While section 93 appears to give discretion to an accounting officer to pre-qualify suppliers where the procurement is not for complex and specialized goods, works and services, this Court is guided by the principles in Article 227(1) of the Constitution which provide 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. The main purpose of pre-qualification is to allow for targeted, efficient and effective procedure of engaging the market where open tendering is not being used. It thus ensures fairness and transparency, and it is my finding that it is required to be employed in all procurements which are not by open tendering for this reason.

53. In addition, it is also a requirement under section 102(d) that the intention to tender by restricted means must be advertised by the procuring entity. This procedure is important to ensure equal treatment, non-discrimination and transparency in identifying supplier, and therefore implies a process of identifying potential suppliers after the advertisement, hence the requirement of prequalification. To this extent, the Respondent did not err in its finding that it was not open for the Accounting Officer of the 1<sup>st</sup> Applicant to singularly identify the persons to be invited to make bids in Tender No. MOD/423 (0110139)/2017-2018, and that prequalification of suppliers was necessary.

54. On the finding that the Head of Procurement cannot change the recommendation of an award made by the tender evaluation committee, section 47 of the Act provides as follows as regards the functions of the head of procurement in a procuring entity:

**“(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.**

**(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.**

**(3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement.”**

55. Further, section 84 makes provisions for the nature and manner of professional advice on a tender given by heads of procurement on the following terms:

**“(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.**

**(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.**

**(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).”**

56. Section 85 of the Act clarifies on the role of the Head of Procurement *vis-a-vis* the evaluation committee thus:

**“Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.**

57. It is therefore evident from a plain readings and interpretation of the above sections that the Head of Procurement can give professional advice and make recommendations on decisions made by an evaluation committee, including on the person to be awarded the tender. It is also notable that the final decision in this regard is that of the Accounting Officer, who is obliged to take into account the Head of Procurement’s recommendations. The Head of Procurement and the Accounting Officer therefore did not act illegally in making changes to the recommendations of the evaluation committee. Since the findings by the Respondent on the actions of the Head of Procurement and Accounting Officer were on the ground that they did not have the power to make the said changes, and not on the merit of the changes, this Court finds that the Respondent erred in its findings in this regard.

58. Lastly, the 1<sup>st</sup> Applicant also urged that 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.”**

59. The jurisdiction of the Respondent to hear a tender dispute and review a tender, including on the responsiveness of a tender, has to 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 1<sup>st</sup> Respondent's tender had met the mandatory conditions. The issue whether or not the 1<sup>st</sup> Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.”

60. It is notable that the actual orders made by the Respondent in its decision of 10<sup>th</sup> July 2019 on the 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, were as follows:

**“1. The Applicant's Request for Review dated 20<sup>th</sup> June 2018, in respect of Tender No. MOD/423 (0110139)2017-2018 for the Supply of Fresh Meat (Beef) on Bone to Eldoret Based Units be and is hereby allowed.**

**2. The procurement process herein including the award of the above tender to the successful bidder herein M/S Peema Investments Limited be and is hereby annulled.**

**3. The Procuring Entity is directed to re-tender afresh for the supply of the goods which were subject matter of this Request for Review within a period of 45 days from today's date.**

**4. The Procuring Entity is directed to extend the contract of the current supplier of the subject item of procurement, Messrs Avenue Butchery, until a new supply contract is in place.**

**5. Owing to the fact that the bidders will have an opportunity to participate in a fresh procurement process, each party shall bear its own costs of this Request for Review.”**

61. The 1<sup>st</sup> Applicant has challenged the order requiring it to extend its contract with Avenue Butchery Ltd, on the ground that the contract had lapsed and the order was tantamount to making a fresh award. I am constrained to agree with the 1<sup>st</sup> Applicant as regards this particular order, for reasons that no prayers were made as regards the contract with Avenue Butchery Ltd, and no evidence was tendered nor findings made as to the existence of this contract in the 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, that could be the basis of this order. Furthermore, this Court has already found that the issues regarding and arising from the contract between the 1<sup>st</sup> Applicant and Avenue Butchery Ltd, which is the 2<sup>nd</sup> Interested Party herein, were not within the Respondent's jurisdiction, neither did they arise from procurement processes for Tender No. MOD/423 (0110139)/2017-2018.

62. Therefore, even though the Respondent is given wide powers under section 173 of the Act as to the orders it can make, it could not direct the 1<sup>st</sup> Applicant to extend its contract with Avenue Butchery Ltd, as this was an aspect that neither pleaded nor urged in the 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, and did not arise in the subject procurement proceedings. This particular order was therefore erroneous for these reasons.

#### ***Whether the Applicants are entitled to the Relief Sought***

63. The last issue is that of the remedies sought by the Applicants. The Applicants have sought orders of certiorari, and 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 the said order:

**“...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.”**

64. This Court has found that in the Respondent had no jurisdiction to hear and determine the 2<sup>nd</sup> Interested Party's Request for Review in PPARB Application No. 81 of 2018. The Applicants are therefore entitled to the orders sought of certiorari to quash the decision and orders by the Respondent in PPARB Application No. 81 of 2018.

65. As regards the 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, the Respondent acted in error of law only in relation to the powers of the Head of Procurement and Accounting Officer to change the recommendations by the tender evaluation committee in the subject procurement. In addition, it could not legally direct the 1<sup>st</sup> Applicant to extend its contract with Avenue Butchery Ltd, as this was an aspect that neither pleaded nor urged in the Request for Review. This findings notwithstanding, this Court has found that the Respondent's decision that the procurement process was not conducted according to the law on account of failure on the part of the procuring entity to prequalify suppliers was legally sound, and this vitiated the entire procurement process.

66. To this extent the order of certiorari would not normally lie with respect to the decision and orders made on the 1<sup>st</sup> Interested Party's

Request for Review in PPARB Application No. 82 of 2018, for reasons that they were largely justified. However, given the existence of an erroneous order amongst the said orders, they cannot be upheld in their current terms, and I will have to make the appropriate orders in the circumstances.

67. This Court is in this respect granted inherent powers by section 3A of the Civil Procedure Act to make such orders that are necessary in the interests of justice. Section 11 (1) of the Fair Administrative Action Act also provides as follows as regards the orders this Court can make in judicial review proceedings, which have now been greatly expanded:

**(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-**

**(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**

**(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**

**(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**

**(d) prohibiting the administrator from acting in particular manner;**

**(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**

**(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**

**(g) prohibiting the administrator from acting in a particular manner;**

**(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**

**(i) granting a temporary interdict or other temporary relief; or**

**(j) for the award of costs or other pecuniary compensation in appropriate cases.**

68. Section 11 (1) (e) and (h) of the Fair Administrative Action Act in this respect permits this court to remit a matter back to the decision maker for reconsideration, and the Respondent can therefore be compelled to act according to the applicable law in the present application. This Court can also in the interim period provide temporary interdicts or other temporary relief.

69. In the premises this Court finds that the 1<sup>st</sup> Applicant's Notices of Motion dated 26<sup>th</sup> September 2018, and the 2<sup>nd</sup> Applicant's Amended Notice of Motion dated 25<sup>th</sup> April 2019, are merited only to the extent of the following orders:

**I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing, the decisions of the Respondent in the 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, and in the 2<sup>nd</sup> Interested Party's Request for Review in PPARB Application No. 81 of 2018, which were both dated 10<sup>th</sup> July 2018.**

**II. The 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018 is hereby remitted to the Respondent for hearing and determination in accordance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, and any other applicable laws or regulations as noted in this judgment, and within 30 days of the date of this judgment.**

**III. Pending the re-hearing and determination by the Respondent of the 1<sup>st</sup> Interested Party's Request for Review in PPARB Application No. 82 of 2018, the *status quo* existing as at the date of this judgment as regards supply of meat on bones to the 1<sup>st</sup> Applicant shall obtain.**

**IV. Each party shall meet their respective costs of the 1<sup>st</sup> Applicant's Notices of Motion dated 26<sup>th</sup> September 2018, and the 2<sup>nd</sup> Applicant's Amended Notice of Motion dated 25<sup>th</sup> April 2019.**

70. Orders accordingly.

DATED AND SIGNED THIS 11<sup>TH</sup> DAY OF NOVEMBER 2019

P. NYAMWEYA

JUDGE

DELIVERED ON BEHALF OF JUSTICE P. NYAMWEYA AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2019

J.M. MATIVO

JUDGE