**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 358 OF 2018**

# IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NO. 96/2018 OF 31 JULY 2018

## AND

**IN THE MATTER OF APPLICATION BY UNIQUE SUPPLIES LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

## AND

## IN THE MATTER OF THE PRINCIPLE SECRETARY OF MINISTRY OF DEFENCE

## AND

## IN THE MATTER OF THE TENDER CONTRACT NUMBER MOD 423 (07023) 2017/2018

## AND

## IN THE MATTER OF ARTICLES 22, 23, 47 (1) (2) AND 165 (2) (B) (C) OF THE CONSTITUTION

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE.....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD...3RD RESPONDENT**

**AND**

**KENYA TENTS LIMITED.....INTERESTED PARTY**

**AND**

**UNIQUE SUPPLIES LTD.....EX PARTE APPLICANT**

**JUDGMENT**

**The parties**

1. The *ex parte* applicant, Unique Supplies Limited is a limited liability company incorporated in Kenya under the provisions of the companies Act.

2. The first Respondent is the Principal Secretary, Ministry of Defence appointed under Article 155 of the Constitution.

3. The second Respondent is the Honorable Attorney General, the Principal government legal adviser and representative pursuant to Article **156** of the Constitution. He represents the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings.

4. The third Respondent, the Public Procurement Administrative Review Board, is a central independent procurement appeals review board established under section **27** of the Public Procurement and Asset Disposal Act[1] (herein after referred to as the act). Its functions pursuant to section **28** of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.

5. The Interested Party, Kenya Tents Limited, is a limited Liability Company duly incorporated in Kenya under the provisions of the companies Act.

**The factual matrix**

6. The *ex parte* applicant states that it participated in Tender Number MOD/423(07023) 2017/2018 for the supply of tents to the Defence forces. It states that its bid was accepted for the supply of Frame Tents, and, that on 31 stMay 2018, it confirmed its willingness to sign the contract, and, that it signed the contract on 18thJune 2018.

7. In addition, the *ex parte* applicant states that despite being the successful bidder, it was joined in Request for Review application Number 96 of 2018, between *Kenya Tents Limited v Ministry of Defence.* It also states that on 28thAugust 2018, it received a call from the Ministry of Defence, and, the caller informed it that the third Respondent had nullified the contract. In addition, it states that by a letter dated 29 th August 2019, the Ministry of Defence notified it about the said ruling.

**Legal foundation of the application**

8. The *ex parte* applicant states that it was not given the opportunity to be heard in the Request for Review in violation of its rights under Articles 47 and 50 of the Constitution.

**Reliefs sought**

9. The *ex parte* applicant prays for the following reliefs:-

> *a) An order of certiorari to quash the decision made on the 20thAugust 2018 by the third Respondent annulling and cancelling Tender Number MOD/423(07023)/2017/2018.*
>
> *b) Spent.*
>
> *c) That the court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.*
>
> *d) That the costs of this application be provided for.*

**The Respondent**

10. The Respondent's did not file a Reply to the application.

**The Interested Party's grounds**

11. The Interested Party filed grounds stating *inter alia* that:-

> *a) That the applicant has not shown legal basis to quash the decision, nor has it shown that the first Respondent breached the provisions of the act.*
>
> *b) That the first Respondent failed to conduct an evaluation within the thirty-day period as required under section 80(6) of the Act.*
>
> *c) That the first Respondent entered into a contract with the applicant after the tender validity period had expired contrary to section 135 (3) of the Act.*
>
> *d) That it is not in the interests of justice to quash the decision and fail to check the first Respondent's breach of statutory duty.*
>
> *e) Failure to notify the ex parte applicant does not change the fact that the Respondent breached express provisions of the Act, hence, this court ought to decline the orders sought.*

*f) Should the court find that the ex parte applicant was not heard, this court ought to refer the matter back for reconsideration as provided under section 11(1)(e) of the Fair Administrative Action Act.*

**Issues for determination**

12. I find that the following issues fall for determination:-

*a) Whether the Review Board erred in failing to notify the ex parte applicant about the Request for Review.*

*b) Whether the relief of certiorari is merited in the circumstances of this case.*

***a) Whether the Review Board erred in failing to notify the ex parte applicant about the Request for Review***

13. The *ex parte* applicant's counsel submitted that the *ex parte* applicant was not enjoined in the proceedings before the review Board nor was it notified about the proceedings. He argued that the failure was a violation its rights under Articles 47 and 50 of the Constitution and the Fair Administrative Action Act.[2] Counsel cited *Peesam Limited v Public Procurement Administrative Review Board & 2 Others*[3] and submitted that under section 170 of the Act, the *ex parte* applicant was a party to the Request for Review. He placed further reliance on *Judicial Service Commission (JSC) v Mbalu Mutava & Another*[4] and argued that as the successful bidder, the *ex parte* applicant ought to have been included in the proceedings before the Review Board. He also relied *El Roba Enterprises Limited & 5 Others v James Oyondi T/A Beteyo Contractors & 5 Others*.[5]

14. At the hearing of the application, Miss Nyonje, counsel for the first Respondent confirmed that the first Respondent did not file any submissions because they were not opposing the application.

15. Counsel for the second and third Respondents submitted that the Review Board complied with the provisions of the Constitution, the Act and the Regulations. She submitted that the parties were notified of the pending proceedings before the Review Board. She argued that the Review Board acted lawfully and cited *Kenya Pipeline Company Ltd v Hyosung Ebara Company Ltd & 2 Others*[6] for the holding that the Review Board is a specialized tribunal better placed to handle disputes relating to breach of duty by the procurement entity, hence, matters within its jurisdiction ought not to be lightly interfered with.

16. The Interested Party's counsel submitted that the applicant's participation could not have changed anything. [7]Citing *De Smith's Judicial Review*, counsel submitted that the procedural flaw made no difference and that the court ought to look at a wider picture, that is, whether the decision was properly taken, a position counsel argued was adopted in *Republic v Chuka University Ex parte Kennedy Omondi Waringa & 16 Others.*[8]

17. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of Review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under Fair Administrative Action Act[9] has been established.

18. It is necessasry to consider the broad principles that underlie the importance of lawful conduct on the part of public statutory bodies when discharging their public duties. In that regard, a brief survey of the applicable constitutional and legislative principles underscoring the importance of a transparent and open public tender process is merited. In *Head of Department, Department of Education, Free State Province v Welkom High School,*[10] the Constitutional court of South Africa emphasized the importance of lawful conduct on the part of public bodies. It enunciated the underlying principles as follows:-

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

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

20. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given.[11] This lies at the heart of the rationality test. Our courts have consistently held that rationality is a minimum requirement applicable to the exercise of public power in that decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with the requirement of rationality. The rational connection means that objectively viewed, a link is required between the means adopted by the person exercising the power and the end sought to be achieved. The test therefore in relation to rationality requirements is twofold. *First*, the decision-maker must act within the law and in a manner consistent with the Constitution. The decision maker must not misconstrue the nature of his or her powers. *Second*, the decision must be rationally related to the purpose for which the power was conferred. This is because if it were not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.[12]

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

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

23. Article 227 emphasis on fairness on government procurement process. The process of procurement has a value in itself, which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of Article 47 of the Constitution and the Fair Administrative Action Act, [13] which guarantee every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

24. Section 170 of the act provides that the parties to a review shall be— (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.

25. Regulation 74 of The Public Procurement and Disposal Regulations, 2006, provides for Notification of filing of request as follows:-

> ***74***
>
> *1) The Secretary shall immediately after the filing of the request under Regulation 73, serve a copy thereof on the procuring entity or Director General as the case may be.*
>
> *2) The copy to the procuring entity under paragraph (1) shall also contain a notification of the pending review and the suspension of the procurement proceedings of such procuring entity.*
>
> *3) Upon being served with a notification of a request, the procuring entity or the Director General shall within seven days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify.*
>
> *4) The Secretary shall, within fourteen days of the filing of the request, notify all other parties to the review of the filing and such parties may, at their own expense, obtain copies of the request for review. (Emphasis added)*

26. The above provisions place an obligation upon the Secretary of the Review Board to within 14 days; notify all other parties to the review of the filing of the request. The Parties to a review as defined in section 170 reproduced above include "the tenderer notified as successful by the procuring entity."

27. The use of the word *shall* in the above provision is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[14]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[15] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

28. It is the duty of courts of justice to try to get at the real intention of the Constitution, legislation or Regulations by carefully attending to the whole scope of the Constitution, statute or Regulations to be considered. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

29. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[16] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[17] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

30. I find no need to re-emphasize that that the above provision is mandatory. It is common ground that the third Respondent only filed submissions arguing that all the parties were notified. Unfortunately, it never filed any affidavit to rebut the *ex parte* applicant's contention that it never served the Notification. A replying Affidavit explaining how the Notification (if any) was served was extremely necessary. The omission by the third Respondent to file a Replying Affidavit and even annex the Notification if at all it was served left the *ex parte* applicant's averments uncontested. The first Respondent who was the Procuring Entity never filed any Response. In fact, its counsel supported the application.

31. Curiously, the Interested Party also never filed any affidavit to challenge the said averments. It follows that the *ex parte* applicant's averments remain unchallenged. In absence of the contrary, I find and hold that contrary to the above clear provisions, the ex parte applicant was not notified about the Request for Review. The said omission, viewed from the lens, scope and purpose of the above provisions render the ensuing decision legally frail and susceptible to challenge.

32. Because of the above failure, the *ex parte* applicant argues that its rights to a fair hearing under Article 50 of the Constitution and its right to a fair Administrative Action guarantee under Article 47 of the Constitution and section 4 of the Fair Administrative Action Act[18]were violated.

33. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[19] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it. A decision is contrary to natural justice if the decision maker denies a litigant some right, privilege, or benefit to which he is entitled to in the ordinary course of the proceedings.[20]

34. Procedural fairness has received a constitutional seal of approval. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[21] Further, there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[22]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

35. The issue that inevitably follows is whether the manner in which the third Respondent made the impugned decision amounted to "procedural impropriety." Differently stated, did the third Respondent violate procedural requirements or did the third Respondent act *ultra vires* or in breach of the rules of *natural justice*.

36. Natural Justice has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement. It ensures a strong safeguard against any Judicial or administrative, order or action, adversely affecting the substantive rights of the individuals. In *Local Government Board v. Arlidge*,[23] Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." (Emphasis added)*

37. What is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[24] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law*[25] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power. As Sir William Wade in his Administrative Law put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected."[26]

38. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[27]

39. Section **4** of the Fair Administrative Act[28] re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub-section 4 obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

40. Procedural fairness contemplated by Article **47** and the Fair Administrative Action Act[29] demands a right to be heard before a decision affecting ones right is made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[30]

41. The *ex parte* applicant was not enjoined as a party in the proceedings before the Review Board. The failure to enjoin the *ex parte* applicant in the proceedings or notify it about the Request for Review was a gross violation of the Rules of Natural Justice. As the successful bidder, the *ex parte* applicant was a necessary party in the proceedings. Such a scenario meant granting orders affecting a party without giving it the benefit of a hearing. The Supreme Court of India in *Prabodh Verma vs. State of UP*[31] and Tridip *Kumar Dingal vs. State of WB*[32] laid down the law in cases of this nature. The Indian Apex Court held that if a person challenges a selection process, successful candidates or at least some of them are necessary parties.

42. The principle that comes out in the said cases is that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice.

43. I mat profitably quote the principle of natural justice enunciated by the Supreme Court of India in *Canara Bank vs. Debasis Das:-*[33]

> *"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."*

And again:-

> *"Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."*

44. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative order or action, adversely affecting the substantive rights of the individuals.

45. Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.

46. The Supreme Court of India put it succinctly in *J.S. Yadav vs State of U.P. & Anr*[34] in Paragraph **31** held thus:-

> *"No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the… Code of Civil Procedure,… provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail..."*

47. The facts of this case are graphically clear. The *ex parte* applicant was a necessary party in the Request for Review. It is beyond doubt that the third Respondent violated Regulation 74, section 170 of the Act, Article 50 and 47 of the Constitution. It follows that the ensuing decision is tainted with illegality and procedural impropriety. On this ground alone, this application succeeds.

***b. Whether the relief of certiorari is merited in the circumstances of this case.***

48. The *ex parte* applicant's counsel submitted that the impugned decision is tainted with illegality, irrationality and procedural impropriety. He urged the court to quash it. He relied on *El Roba Enterprises Limited & 5 Others v James Oyondi T/A Betere & 5 Others*[35] and *Peesam Limited v Public Procurement Administrative Review Board & 2 Others*.[36]

49. As stated earlier, counsel for the first Respondent stated that the first Respondent who was the Procuring Entity supported the application.

50. The second and third Respondent's counsel cited *Judicial Service Commission ex parte Pareno*,[37] counsel argued that the applicant has not established any grounds to warrant the orders sought. Counsel argued that the impugned decision was reasonable, rational and lawful.

51. The Interested Party's counsel submitted that the judicial review orders sought are unwarranted. He argued the tender was not evaluated within 30 days and that the contract was signed after the tender validity period had lapsed. He placed reliance on *Master Power Systems Limited v Public Procurement Administrative Review Board & 2 Others*,[38] *De Smith's Judicial Review*[39] and *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracen Media Limited*.[40]

52. It is important to point out that the Interested Party never filed a Replying affidavit deposing the above allegations. It only filed grounds of opposition. By making submissions in the manner stated above, counsel for the Interested Party was simply adducing evidence from the bar by way of submissions. Such submissions, no matter how attractive they may be, cannot constitute prove of the allegations in question nor can they rebut the *ex parte* applicants averments.

53. Without prejudice to the above, it is important to point out that the Notification of the Tender is dated 30 thMay 2018. The letter of acceptance is dated 31stMay 2018. The first Respondent received it on 4thJune 2018, within the 14 days provided for acceptance. The contract is dated 18thJune 2018, more than 14 days from the date of accepting the offer. The time lines provided in section 135 of the act were adhered to. It follows that the Interested Party's Advocates contention is legally and factually frail and is bound to fail.

54. In addition, counsel for the Interested Party urged the court in the event it finds that the orders sought are warranted, the appropriate orders would be to refer the matter back to the third Respondent for reconsideration. For this proposition, counsel relied on *Republic v Principal Secretary, Ministry of Internal Security & Another ex parte Schon Noorani & Another,*[41] R*epublic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya* Power and Lighting Company Limited[42]and *Haji Motors Limited & 2 Others v Public Procurement dministrative Review Board & 2 Others*.[43]

55. Cases are context sensitive. As the Supreme Court of India once stated, if content gives the color, context gives the texture. Both cannot be ignored. The facts and circumstances of this case cannot attract the said suggestion. The contrary is true. The suggestion is unattractive and in applicable in the circumstances of this case.

56. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations or the Tender terms and conditions. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[44]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

57. In *Council of Civil Service Unions v. Minister for the Civil Service*[45] Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; *proportionality*.[46]What Lord Diplock meant by *“Illegality”* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *“Irrationality”* by succinctly referring it to *“unreasonableness”* in Wednesbury Case.[47] By *“Procedural Impropriety”* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

58. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[48]where it was held that once a Judicial Review court fails to sniff any *illegality*, *irrationality* or *procedural impropriety*, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

59. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

60. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts’ function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

61. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved.

62. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been followed or if the "rules of natural justice' are not adhered to. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service*[49] to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[50]

63. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[51] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[52]

64. *Certiorari* issues to quash a decision that is *ultra vires*.[53] Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A proper analysis of the manner in which the impugned decision was undertaken and the breaches of the constitution, the act and the Regulation highlighted above leads me to the conclusion that the *ex parte* applicant has established that the decision suffers from illegality and procedural impropriety. Put differently, the *ex parte* applicant has demonstrated that the third Respondent acted *ultra vires* its statutory mandate and in breach of Articles 47 and 50 of the Constitution. Simply put, it ignored the express provisions of Regulation 74 and section 170 of the Act.

65. In view of my analysis and conclusions herein above, the conclusion becomes irresistible that the *ex parte* applicant's application has merits. Consequently, I allow the Notice of Motion dated **26th** September 2018 and order as follows:-

> *a) An order of certiorari be and is hereby issued quashing the third Respondent’s decision made on 20th August 2018 allowing the Request for Review lodged by M/S Kenya Tents Limited on 31st July 2018 against the decision of the Ministry of Defence in the matter of Tender No. MOD/423 (07023)/2017/2018 for the supply of tents to Kenya Defence Forces.*

*b) An order of certiorari be and is hereby issued quashing the third Respondent's decision made on 20th August 2018 annulling the award and contract entered into between the Procuring Entity and the successful bidder, namely, Unique Supplies Limited in respect of Tender No. MOD/423 (07023)/2017/2018 for the supply of tents to Kenya Defence Forces.*

*c) An order of certiorari be and is hereby issued quashing the third Respondents decision made on 20th August 2018 directing the Procuring Entity to restart the procurement process afresh in respect of Tender No. MOD/423 (07023)/2017/2018 for the supply of tents to Kenya Defence Forces.*

*d) For avoidance of doubt, the Tender No. MOD/423 (07023)/2017/2018 for the supply of tents to Kenya Defence Forces awarded to the ex parte applicant and the contract signed on 18thJune 2018 are hereby reinstated.*

*e) Each party shall bear its costs for this suit*

**Signed, Delivered and Dated at Nairobi this 5th day of November, 2019**

**John M. Mativo**

**Judge**

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[1] Act No. 33 of 2015.

[2] Act No. 4 of 2015.

[3] {2018} e KLR.

[4] {2015}e KLR.

[5] {2018} e KLR.

[6] {2012} e KLR.

[7] Supra, para 8-065.

[8] {2018} e KLR.

[9] Ibid.

[10]2014 (2) SA 228 (CC).

[11] *Affordable Medicines Trust and others v Minister of Health and others* {2005} ZACC 3; 2006 (3) SA 247 (CC) at para 75.

[12] See Moseneke DCJ in *Masetlha v President of the Republic of South Africa and Ano* {2007} ZACC 20; 2008 (1) SA 566 (CC) at para 81.

[13] Act No. 4 of 2015.

[14]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2 ).

[15] Ibid.

[16] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[17] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[18] Act No. 4 of 2015.

[19] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[20] (1897) 18 N.S.W.R. 282, 288 (S.C.).

[21] Article 47(1) of the Constitution.

[22] Article 47(2) of the Constitution.

[23] {1915} AC 120 (138) HL

[24] (1980), at page 161.

[25] (1977) at page 395.

[26] 6th Ed at pages 570.

[27] *Kioa v West* (1985), Mason J.

[28] Act No. 4 of 2015.

[29] Act No. 4 of 2015.

[30] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[31] {1984} 4 SCC 251.

[32] {2009} 1 SCC 768.

[33] {2003} 4 SCC 557.

[34] {2011} 6 SCC 570.

[35] {2018} e KLR.

[36] {2018} e KLR.

[37] HC Misc Civil App No. 1025 of 2003.

[38] {2015} e KLR.

[39] 8thEdition, Sweet & Maxwell, Para 18-047.

[40] {2018} e KLR.

[41] {2018} e KLR.

[42] {2017} e KLR.

[43] {2016} e KLR.

[44] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[45] {1985} AC 374.

[46] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[47] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[48] {2015} eKLR.

[49] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[50] Ibid.

[51] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2*.

[52] Supra, note 18.

[53] See *Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others* {2011} eKLR.