REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION MISCELLANEOUS APPLICATION NO. 118 OF 2019

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

AND

IN THE MATTER OF THE LAW REFORM ACT, THE FAIR ADMINISTRATIVE ACTION ACT

AND

THE CONSTITUTION.

AND

IN THE MATTER OF SECTION 175 (1) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015 AND

IN THE MATTER OF TENDER NO. GF ATM HIV NFM 18/19-011-004 FOR SUPPLY OF ARV MEDICINES-ADULTS

REPUBLIC...APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

KENYA MEDICAL SUPPLIES AUTHORITY (KEMSA)...................INTERESTED PARTY

AND

EMCURE PHARMACEUTICALS LIMITED.................................EX PARTE APPLICANT

JUDGMENT

The Parties

1. The *ex parte* applicant, Emcure Pharmaceuticals Limited, is a fully integrated Indian pharmaceutical

company with global presence engaged in developing, manufacturing and marketing a broad range of pharmaceutical products globally.

2. The 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.

3. The Interested Party, Kenya Medical Supplies Authority (KEMSA), is a body corporate established pursuant to section 3 of the Kenya Medical Supplies Authority Act.[2] It has perpetual succession and a common seal and in its corporate name, it is capable of suing and being sued, purchasing, charging and disposing of movable and immovable property, borrowing money; entering into contracts; doing or performing all such other acts necessary for the proper performance of its functions under the Act. It is the successor to the Kenya Medical Supplies Agency[3] established under the State Corporations Act.[4]

4. Its functions under section 4 of the Kenya Medical Supplies Authority Act[5] include procuring, warehousing and distributing drugs and medical supplies for prescribed public health programmes, the national strategic stock reserve, prescribed essential health packages and national referral hospitals. Its mandate includes establishing a network of storage, packaging and distribution facilities for the provision of drugs and medical supplies to health institutions. It has mandate to enter into partnership with or establish frameworks with county Governments for purposes of providing services in procurement, warehousing, distribution of drugs and medical supplies. Its mandate also includes collecting information and providing regular reports to the national and county governments on the status and cost-effectiveness of procurement, the distribution and value of prescribed essential medical supplies delivered to health facilities, stock status and on any other aspects of supply system status and performance, which may be required by stakeholders. Lastly, it supports county governments to establish and maintain appropriate supply chain systems for drugs and medical supplies.

Factual Matrix

5. It is uncontested that the Interested Party invited sealed tenders for the supply of ARV Medicines-Adults through Open International tender (OIT). It is not in dispute that on 30th January 2019, the *ex parte* applicant submitted its bid documents. The *ex parte* applicant states that while submitting its bid documents, it inadvertently attached its retention certificate for the year 2018 instead of the certificate for the year 2019. It also states that it attached a valid Registration Certificate from the Pharmacies and Poisons Board.

6. Mr. Devbalaji, the *ex parte* applicant's director in the verifying affidavit dated 8th January 2019 deposed that it is a requirement by the interested party that suppliers of any medicine to itself, must be registered and retained by the Pharmacy and Poison Board, and, that, its Certificate of Retention was due to expire on 31st December 2018. He averred that the *ex parte* applicant paid retention fee on 8th November 2018, hence, it holds a Certificate of Retention for the year 2019, which certificate ought to have been uploaded by the Pharmacy and Poisons Board at its portal at the time of the evaluation.

7. In addition, Mr. U. Devbalaji averred that the Interested Party's evaluation committee has access rights to the Pharmacy and Poisons Board portal from where it is expected to verify retention status of all tenderers in the course of evaluation. He also deposed that clause 27 of the tender documents mandates the Interested Party to seek clarification from tenderers on retention status or any matter that may not be clear. He deposed that the *ex parte* applicant has a manufacturing site and the product in question has been pre-qualified by WHO and the Global Fund's Policies on Procurement and Supply Management, June 2012.

8. Mr. Devbalaji further averred that by a letter dated 6th March 2019, the Interested Party notified the *ex parte* applicant that its bid was unsuccessful because the product, the subject of the bid was not retained

with the Pharmacy and Poisons Board because its retention certificate had expired. He averred that the procuring entity had the means to seek clarification, conduct due diligence and establish its 2019 retention status.

Legal foundation of the application

9. The *ex parte* applicant faults the impugned decision on grounds that it is illegal, illogical, and *ultra vires* the provisions of the act, the Fair Administrative Action Act[6] and the Constitution.

10. It also states that the impugned decision disregards the spirit of sections 70, 81 and 83 of the act by failing to find that the omission to supply a retention certificate even after the *ex parte* applicant had supplied a registration certificate was an oversight that could be cleared through clarification. It further contends that the Respondent disregarded the spirit of section 79 and 81 of the act by failing to consider that the omission to supply a retention certificate was an oversight that could be cured by clarification as per clause 27.1 and 29 of the tender document.

11. The *ex parte* applicant also states that the Respondent failed to appreciate that the tender documents required substantial responsiveness, and, that, its bid was substantially responsive because it submitted all documents, save it inadvertently submitted a Certificate of Registration for the year 2018 instead of the year 2019 which it already had obtained.

12. In addition, the *ex parte* applicant states that the Respondent contravened Article 47(1) of the Constitution by misinterpreting what constitutes minor deviations not materially departing from the requirements of the tender. It also states that the Respondent abdicated its obligations to interpret Articles 10, 47, 201 and 227 of the Constitution as required by Article 259. It contends that the applicant being the lowest bidder had substantially complied with all requirements. Accordingly, it contends that its bid ought to have been declared substantially responsive as per clause 29 of the tender document based on the cost effectiveness principle envisaged under Article 227(1) of the Constitution and prudent application of funds envisaged under Article 201 (d) of the Constitution.

The Reliefs sought

13. The *ex parte* applicant seeks an order of *Certiorari* to quash the Respondent's decision made on 9th April 2019 in Request for Review Application No. 28 of 2019-*Emcure Pharmaceuticals Limited v Kenya Medical Supplies Authority* regarding Tender No. GF ATM HIV NFM 18/19-011-004 for supply of ATV Medicies-Adults. It also prays that the costs of the application be provided for.

The Respondent's failure to file a Response

14. On 24thApril 2014, the court gave directions and periods for filing of pleadings in the presence of counsel for all the parties. However, when the matter came up in court again on 15thMay 2019, the Respondent's counsel had not filed any pleadings. Its counsel, Mr. Odhiambo asked for time to comply, and the court granted him three days. When the matter came up in court on 26thJune 2019, the Respondent had not filed any pleadings nor did its counsel attend court. The court directed hearing to proceed, the Respondent's default and failure to attend court notwithstanding.

The Interested Party's grounds of opposition

15. The Interested Party filed grounds on 24thApril 2019 stating *inter alia* that the application has no merit and is an abuse of court process. It also stated that a contract had been signed with the winning bidder, namely, Mylan Laboratories Limited. Further, it stated that the Respondent conducted the hearing procedurally and in accordance with the law, hence, the decision was reasonable.

The Interested Party's Replying Affidavit

16. In addition to the above grounds, Dr. Jonah Manjari Mwangi, the Interested Party's Chief Executive Officer swore the Replying Affidavit dated 3rd May 2019. He averred that the Respondent's Request for Review lacked merit since the *ex-parte* applicant failed to comply with a mandatory requirement in the tender documents requiring bidders to attach to their bid a current and valid retention certificate.

17. He deposed that the Respondent heard all the parties and in the impugned ruling dated 9th day of April 2019 found that the *ex-parte* applicant failed to comply with a mandatory requirement in the tender document. He deposed that the Respondent considered all the relevant factors in its decision and ordered the Interested Party to proceed with the procurement process to its logical conclusion. He also averred that the contract was signed on 11thApril 2019 between the Procuring Entity and Mylan Laboratories Limited and deliveries were ongoing.

18. Dr. Mwangi averred that Judicial review challenges decision making process and does not review the evidence with a view of forming its own decision on merits, nor can this court substitute the decision with its own. He deposed that the applicant is challenging the merits of the decision because lack of a valid and current retention certificate is a substantive issue going to the merits of the decision. Further, he averred that the application raises contested matters of fact, which are not open for challenge by way of Judicial Review; hence, the proper forum would be to appeal.

19. Dr. Mwangi deposed that the tender was conducted through the Open International Tender (OIT) procedure specified in the Government of Kenya (GOK), the Act, Public Procurement and Disposal Regulations 2006, and, the Global Fund's Policies on Procurement and Supply Management, June 2012. He averred that all bids were evaluated using the criteria set out in the tender documents. He deposed that during the technical evaluation stage, it was discovered that the *ex-parte* applicant did not provide a valid retention certificate, (since the submitted retention certification expired on 31st of December 2018). He deposed that the *ex parte* applicant admitted this fact at paragraph 7 of the verifying affidavit. He averred that the applicant failed to adhere to a mandatory requirement in the tender document.

20. He also averred that the *ex-parte* applicant's bid was found to be non-responsive; hence, the Request for Review was dismissed. He averred that in dismissing the application, the Respondent observed that the said deviation was not minor, and, that for clarification to be available to the *ex-parte* applicant, it should not change the substance of the tender. He deposed that permitting the *ex parte* applicant to submit the clarification would violate section 76(2) of the Act. He deposed that the Respondent considered all the relevant matters in arriving at its decision.

21. In addition, he deposed that the proceedings were procedurally fair, and, that, the Respondent considered all documents of evidentiary value and the submissions, hence, the decision was rational, reasonable, logical, lawful and within the Respondent's mandate under the act and the Public Procurement and Disposal regulations 2006. Lastly, he averred that *Certiorari* lies if there are fundamental breaches of law, natural justice, procedural improprieties and/or other relevant factors.

***Ex parte* applicant's further Affidavit**

22. Mr. U. Devbalaji in his further Affidavit dated 9th May 2019 deposed that on 24th April 2019, the Interested Party in its grounds of opposition and Replying Affidavit stated that the contract had been signed before the lapse of 14 days from the date of the impugned decision. He deposed that under section 175 (1) of the Act, the Respondent's decision is final and binding if no judicial review proceedings are filed within 14 days. He stated that the 14 days were to lapse on 23rdApril 2019, hence, the Interested Party had no mandate to execute the contract prior to the expiry of the said period. He deposed that due to the illegal execution of the contract, it would, at the earliest opportunity seek court's leave to amend its Notice of Motion dated 24th April 2019.

Issues for determination

23. Upon considering the diametrically opposed positions presented by the parties, I find that the

following issues distil themselves for consideration:-

a. Whether the impugned decision is irrational and unreasonable.

b. Whether the Interested Party breached the law by executing a contract before the expiry of 14 days.

c. What are the appropriate orders to issue in the circumstances of this case?

a. Whether the impugned decision is irrational and unreasonable

24. The *ex parte* applicant's counsel argued that the impugned decision is irrational and unreasonable because the Respondent failed to take into account the following relevant factors:-

a) That upon payment of the renewal fees for the 2019 retention certificate, the Pharmacy and Poisons Board indicated in its portal that the applicant's retention for the year 2019 in respect of ATAZOR-R TABLETS Atazanavir Sulphate 300 mg & Ritonavor 100mg/Tablet had been approved.

b) By paying the renewal fees on 8th November 2018, the applicant was deemed as having been retained for the year 2019. However, as at 30th January 2019, the closing date for the submission of the bids, the applicant's retention certificate for the year 2019 had not been released by the Pharmacy and Poisons Board of Kenya, hence, as at the time of submission of his bid, the applicant was not in possession of the retention certificate for the year 2019.

c) The delay in releasing the certificate does not invalidate the applicant's approval for the year 2019.

d) That Interested Party had evidence that the applicant was pre-qualified by the WHO and Global Fund in respect of ATAZOR-R TABLETS Atazanavir Sulphate 300 mg & Ritonar 100mg/Tablet. The evidence being the supply of the product to the Interested Party as per the delivery notes dated 23rd, 24th and 25th January 2019.

e) That the Interested Party did not seek clarification from the ex parte applicant regarding the status of its retention certificate for the year 2019 in accordance with the provisions of section 81 of the Act.

25. It was his submission that had the Respondent considered the above factors, it would have concluded that the applicant's bid was responsive; hence, its decision was irrational. He cited *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunications PVT Limited*[7]for the proposition that this court has powers to review the decision where the respondent fails to take into account relevant matters or considers irrelevant matters.

26. The *ex parte* applicant's counsel also argued that the decision is illegal. He cited section 79 (1) of the Act which defines responsive tenders and argued that the Respondent failed to appreciate that the *ex parte* applicant's tender was substantially responsive since it had submitted all the required documents. He faulted the Respondent for stating that the *ex parte* applicant waited until November 2018 to renew its retention certificate yet the issue of timelines was not before the Respondent.

27. Counsel for the Interested Party cited *Republic v Chief Magistrate Makindu & another Ex-Parte Bernard Musau Mailu & 2 others****[8]*** and *Captain Geoffrey Kujoga Murungi vs Attorney General,****[9]*** and argued that *certiorari* can on1y be issued where the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice or contrary to law. He argued that the alleged evidence of retainer payment was introduced during the hearing before the Respondent and was never availed to the Interested Party during evaluation of tenders. He submitted that the applicant during the submission of its tender did not attach the payment receipt for the renewal fee or the screenshot from the Pharmacy and Poisons Board portal indicating that it was retained. He submitted that the applicant's

bid was dismissed for failing to comply with a mandatory requirement. He argued that the Respondent held that the applicant's failure to attach a 2019 retention certificate was not a minor deviation under section 79(2) of the Act and thus its bid failed to meet the mandatory requirement at the Technical stage contrary to section 79(1) of the Act.

28. Counsel submitted that it was not irrational or unreasonable for the Respondent to arrive at the impugned decision on the strength of the evidence before it. He relied on *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd* [10] for the holding that the Review Board is better equipped than the High Court to handle disputes relating to breach of duty by a procurement entity in matters within its jurisdiction, hence; its decision should not be interfered with. In the said case, the court also held that where the Tribunal does not commit any jurisdictional errors, its decision should stand.

29. He cited *Republic v Public Procurement Administrative Review Board & another Ex Parte GIBB Africa Ltd & Another* ***[11]*** for the proposition that the decision maker must understand the law**.** He referred to sections 60(1) and 79 (1) and argued that under section VIII of the tender document, it was a mandatory requirement for the evaluation committee to ascertain that each bid under examination had provided a current Product registration and retention certificates with QR codes from the Kenya Pharmacy and Poisons Board. He also cited *Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited*[12] for the holding that bids that do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration. The court in the said case defined a responsive bid as the one that meets all requirements as set out in the bid document.

30. If, in the exercise of its discretion on a public duty, an authority takes into account considerations, which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds. These are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

31. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings* ***[13]*** in which Lord Justice of Appeal Simon Brown identified three categories of considerations that decision-makers need to be aware of:-[14]

> *a) those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had;*
>
> *b) those clearly identified by the statute as considerations which must not be had; and*
>
> *c) those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.*

32. Lord Justice Brown elaborated that for the third category, there is "a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process," subject to *Wednesbury* unreasonableness.

33. The Singapore case of *City Developments Ltd. v. Chief Assessor* ***[15]*** illustrates a similar point. The Court of Appeal stated, "Where a wide range of considerations needs to be taken into account or a power is conferred on an authority exercisable on the authority's 'satisfaction', the courts are reluctant to intervene in the absence of bad faith or capriciousness." It was also said, "What is or is not a relevant consideration will depend on the statutory context."[16]

34. The duty of the court is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law, and, had in consequence taken into consideration the matters which upon the true construction of the Act, it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations.

35. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot*,[17] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the Commission, not the courts.[18]

36. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment*,[19] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."[20] His Lordship stated:-

> *"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at. "*

37. Judicial oversight is necessary to ensure that such decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[21]The administration of justice is highly contextual and fact sensitive. Consequently, what may amount to a fair-minded exclusion of a bidder on grounds of non-responsiveness in one context may not be regarded as fair in a different context. Judicial utterances on the issue of bid responsiveness must therefore be understood within the factual matrix of each decided case. What matters is to establish whether the decision was taken in a manner, which is lawful, reasonable, rational and procedurally fair.

38. Section 79 of the act provides as follows:-

79. Responsiveness of tenders

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

39. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out

in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[22] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril.[23]

40. Such formalities are usually listed in bid documents as mandatory requirements – in other words, they are a *sine qua non* for further consideration in the evaluation process.[24]The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

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

42. Under section 79 (2) (a) (b) of the act, the procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender.

43. The World Bank Procurement Guidelines similarly provide as follows:-

> *"The Borrower shall ascertain whether the bids (a) meet the eligibility requirements specified in paragraph 1.8, 1.9, and 1.10 of these Guidelines, (b) have been properly signed, (c) are accompanied by the required securities or required declaration signed as specified in paragraph 2.14 of the Guidelines, (d) are substantially responsive to the bidding documents; and (e) are otherwise generally in order. If a bid, including with regard to the required bid security, is not substantially responsive, that is, it contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents, it shall not be considered further. The bidder shall neither be permitted nor invited by the Borrower to correct or withdraw material deviations or reservations once bids have been opened."* ***[25]*** *(Emphasis added)*

44. A bid that contains "minor informalities" is not considered non-responsive. A minor informality or irregularity, in turn, is defined as:-

> *"one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government."* ***[26]***

45. The decision as to whether or not a particular nonconformity constitutes a minor deviation or informality under procurement law has sometimes been characterised as a discretionary one. However,

the major focus must be on the prejudice to other bidders rather than on the degree of nonconformity in determining if a bid is nonresponsive. A material nonconformity that gives the bidder in question no advantage or that operates to the disadvantage only of the bidder will thus not result in rejection.[27] The Evaluation Committee can in other words under limited circumstances require the waiver of an otherwise significant deviation where no competitive advantage would result.[28]However, in the case of material nonconformities, it is "immaterial whether the nonconformity is deliberate or occurs by mistake, or whether the bidder is willing to correct or modify the bid to conform to the terms of the invitation."[29]

46. In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender.

47. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

48. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case. The *ex parte* applicant concedes that it omitted to include the 2019 retention Certificate even though it claimed it paid for it in November 2018. It also admits there was a delay in issuing the license; again, admitting that at the time of submission and evaluation, it did not have the Certificate.

49. However, the Review Board at page 22 of its ruling observed that this information was not before the Evaluation Committee since the receipts were not attached. It observed that the Evaluation Committee was left with no choice but to evaluate the applicant’s bid in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it. The Review Board went further and cited the Global Fund Policies on Procurement and Supply Management of Health Products, which requires compliance with applicable laws and authorizations relating to the health products pursuant to the requirements established by the authority in which the products will be utilized.

50. In addition, the Review Board observed that under clause 6.4 section 1 on Instructions to Tenderers, it was a requirement that bidders provide valid registration and retention certificate from the Pharmacy and Poisons Board concerning the offered items. In addition, clause (B) (viii), section VIII provided for current product registration and retention certificates with QR codes from the Kenya Pharmacy and Poisons Board. The Review Board concluded that a valid retention certificate was a mandatory requirement.

51. 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[30] has been established.

52. *First,* in public procurement regulation, it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. *Second,* it is important for bidders to

compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. *Third*, requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions. *Fourth*, fairness must be decided on the circumstances of each case. Whatever is done may not cause the process to lose the attribute of fairness or, in the constitutional sphere, the attributes of transparency, competitiveness and cost-effectiveness.

53. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[31] as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.’ Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him. [32]

54. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *“objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*[33] and that the *impugned decision had to be “verging on absurdity” in order for it to be vitiated*.[34]This stringent test has been applied in Australia[35] where the Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required “something overwhelming.” It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when “looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them.”

55. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law.

56. The following propositions can offer guidance on what constitutes unreasonableness. *First*, *wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. *Second*, this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the “range” within which reasonable minds may differ. *Third*, the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was “not reasonably open” is the same as saying that “no reasonable decision maker” could have made it.

57. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

58. Legal unreasonableness comprises of any or all of the following, namely- specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[36]

59. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

60. In *Council of Civil Service Unions v. Minister for the Civil Service*[37] Lord Diplock enumerated a threefold classification of grounds for the court to intervene, 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*.[38]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 as*"unreasonableness"* in *Wednesbury* Case.[39] 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.

61. The role of the court in such cases was well stated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[40]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. In such a case, 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.

62. When a tender is passed over or regarded as non-responsive, the reasons for passing over such tender must be defendable in any court of law. When a tender is declared to be responsive, the reasons for so declaring must with equal force be defendable in law. To be considered for award, a bid must comply in all material respects with the invitation for bids. An assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process. In other words, what is important is not who won the tender, but the nature and extent of the alleged irregularity, and its materiality.

63. The applicant admits that it did not attach the documents in question in its bid documents. Considering the bid requirements, the requirements for bid documents to be substantive, and the mandatory requirements in the enabling statute, I am not persuaded that a different person or tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion.

64. The provisions of the law cited above and the jurisprudence discussed above fortify my conclusion. The *ex parte* applicant has not demonstrated that a reasonable person properly directing his mind to the facts, circumstances and the law could have arrived at a different conclusion. Put differently, the *ex parte* applicant has failed to demonstrate the decision is unreasonable or irrational. This is because the omitted documents were mandatory requirements under the tender documents. It follows that the Respondent did not take into account irrelevant considerations.

b. Whether the Interested Party breached the law by executing a contract before the expiry of 14 days.

65. The *ex parte* applicant's counsel argued that the contract executed between the Interested Party and Mylan Laboratories Limited on the procurement, the subject of the impugned tender is invalid because it was executed before the expiry of 14 days in contravention of section 175(1) of the Act. He pointed out

that the impugned decision was rendered on 9th April 2019, and, that, these proceedings were filed on 17th April 2019. He stated that the contract was signed on 11th April 2019, barely two days after the decision. He stated that the 14 days were to lapse on 23rd April 2019. To buttress his argument, he cited *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Adan Osman Godana t/a Eldoret Standard Butchery*[41] for the proposition that the decision of the Review Board only becomes binding upon the parties as final if no judicial review is filed to the High Court within 14 days. The court in the said case also stated that the law does not contemplate that a procuring entity would enter into a contract with the successful bidder before the elapse of 14 days from the date of the decision by the Review Board.

66. He placed further reliance on *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Furniture Elegance Limited.*[42] In this case, the court stated that a party aggrieved by the decision of the Review Board has an automatic stay or the decision remains frozen for 14 days to enable the aggrieved party to challenge the decision by way of judicial review or by other means. In the same vein, the court was emphatic that the rushed contract was no contract at all and that a tribunal or an administrative body has no inherent power to direct the performance of a contract outside the stipulated statutory timelines.

67. To fortify his argument, counsel cited *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 Others.*[43] Here, the court stated that any party who partakes of an illegal contract while knowing that it ought to have known that it was illegal to enter into such an illegal contract cannot be forgiven for partaking in such an illegality. The court in the said case also stated that such a party would suffer the perils of the doctrine of *volenti non fit injuria* because all the parties are presumed to know the law.

68. Counsel for the Interested Party did not address this issue at all.

69. I deem it appropriate 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,* ***[44]*** 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."*

70. 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.

71. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given.[45] 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.[46]

72. Article 227 of the Constitution is the source of the powers and function of organs of state in procurement of goods and services. The Article provides that where an organ of state 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. This requirement must be understood together with the constitutional precepts on administrative justice in Article 47 of the Constitution and the basic values and principles governing public service in Article 232 of the Constitution.

73. Thus, 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.

74. Section 173 of the act provides that upon completing a review, the Review Board may do any one or more of the following:-

> *i. Annul anything the Procuring Entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;*
>
> *ii. Give directions to the Procuring Entity with respect to anything to be done or redone in the procurement proceedings;*
>
> *iii. Substitute the decision of the Review Board for any decision of the Procuring Entity in the procurement proceedings;*
>
> *iv. Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and*
>
> *v. Order termination of the procurement process and commencement of a new procurement process.*

75. The person submitting the successful tender and the Procuring Entity shall enter into a written contract based on the tender documents, any clarifications and any corrections of arithmetic errors made therein, within the period specified in the notification <u>but not until at least fourteen (14) days have elapsed following the giving of that notification</u>.

76. The question whether a procuring entity can validly enter into a contract with the successful bidder before the expiry of 14 days from the date of the decision of the Review Board has been the subject of judicial construction by our superior courts. Fortunately, for me, I am travelling on a path that has been trodden by others before me. In this regard, the authorities cited by the *ex parte* applicant's counsel referred to above are to the point. I find no use to rehash the principles laid down therein and illuminating exposition of the law and interpretation of the applicable provisions. I can usefully add that it is the duty of courts of justice to try to get the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. 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.

77. 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. The drafters of the act deliberately granted an

aggrieved party the opportunity to challenge the decision within 14 days.

78. 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,[47] which guarantee every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

79. The right to apply for Judicial Review under section 175 of the act is not only a statutory remedy but also it is a constitutional remedy underpinned by Articles 22, 23(f) and 165(6) of the Constitution. If a procuring entity mischievously decides to sign a contract with the successful tenderer before the expiry of the statutory provided period to seek judicial review, the signing of the contract will automatically and unfairly deprive the unsuccessful tenderer of the remedy under the said provisions. It will be a direct affront to the said provisions.

80. It is safe to state that the drafters of the act where careful to afford an aggrieved party the opportunity to challenge the decision at any stage of the procurement process. This is evident from a reading of section 167 (1) of the act. In addition, section 135 (3) of the act provides for creation of procurement contracts in the following words:-

> *(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.*

81. The above provision is clear. After the Notification of the successful bidder, the procuring entity cannot enter into a contract with the successful bidder before the expiry of 14 days. This period is accorded to the aggrieved party to challenge the decision before the Review Board.

82. In the same vein, after the decision of the Review Board, an aggrieved party is granted 14 days within which to apply for Review in the High Court. Our courts have consistently held that the decision remains frozen for 14 days from the date of the decision. Transparency, which is at the core of public procurement law and Regulations, demands that the procurement procedure or the decision or action involved shall be subject to scrutiny and liable to challenge. The question whether any procurement is valid must be answered with reference to the Constitution, the governing legislation and Regulations. The enabling statute grants an aggrieved party the right to approach the High Court. The fairness contemplated under Article 227 of the Constitution cannot be realized where a procuring entity purports to sign a contract before the expiry of the 14 days.

83. Differently put, the procuring entity cannot enter into a valid contract before the expiry of the 14 days after the decision of the Review Board. It follows that the purported signing of a contract between the Interested Party and the successful bidder, namely Myland Laboratories Limited is illegal. The ensuing contract is therefore legally frail.

84. The question whether or not this court has been properly moved to nullify the said contract will be addressed under the next issue.

c. What are the appropriate orders to issue in the circumstances of this case?

85. *First,* the *ex parte* applicant seeks an order of *Certiorari* to quash the impugned decision. The core ground is that the Respondent failed to take into account relevant considerations. I have already determined above that, the omitted documents were mandatory bid requirements and that the Respondent carefully and properly addressed the issue and applied its mind to the law.

86. The impugned decision has not been shown to be legally frail on any of the known grounds for judicial review. Judicial Review is concerned with testing the legality of the administrative decisions. A

decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.[48] Simply put, subjecting the entire procurement process to the values set out in Article 227(1), I am not persuaded that the tender process cannot be read in a manner that is consistent with the said values and the dictates of the procurement laws and Regulations. Accordingly, the *ex parte* applicant plea for an order of *certiorari* fails.

87. *Second*, the *ex parte* applicant deployed a lot of energy and legal ammunition assaulting the tender signed between the Interested Party and Myland Laboratories Limited. I have already held that a Procuring Entity cannot legally sign a contract before the expiry of 14 days from the date of the decision. I have no doubt in my mind that the contract allegedly signed between the procuring entity and the Myland Laboratorities Limited was entered into prior to the period provided by the law, hence, it is voidable.

88. Mr. Devbalaji deposed in his further affidavit that the *ex parte* applicant intended to amend its application, perhaps to introduce the developments relating to the signing of the contract. Curiously, this was never done! The *ex parte* applicant never applied for leave to amend its pleadings! Instead, the *ex parte* applicant opted to comfortably proceed with its application as originally drawn. The effect is that the applicant proceeded with its application as originally drawn seeking only one substantive prayer, namely, the prayer for *certiorari* to quash the impugned decision. I have already pronounced myself on the said prayer.

89. On the other hand, I have agreed with the *ex parte* applicant's counsel that no contract can validly be signed before the expiry of 14 days. It follows that the agreement allegedly entered into between the Interested Party and Myland Laboratories Limited was entered into illegally. It is voidable in law. However, there is no prayer before me inviting me to declare the said agreement null and void. In addition, save for the further affidavit, which alluded to the fact that the contract had been already been signed, and indicated that the applicant would be seeking leave to amend its pleadings, the substance of the application before me was geared to establishing the core complaint, that, is, the illegality of the impugned decision. The pleadings do not address the illegal contract. This complaint was only addressed in the submissions, but not in the pleadings. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court[49] on the principles of good pleading:-

> *"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.*
>
> … *Elegance is the simplicity found on the far side of complexity.*
>
> *While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.*
>
> *Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.*
>
> *Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are*

before it for determination."[50] *(Emphasis supplied)*

90. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action.

91. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.

92. The Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited*[51] rendered itself as follows:-

> *"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-*
>
>> *"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."*

93. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat unleaded issues as having been fully investigated.

94. Order 15 Rule 2 of the Civil Procedure Rules, 2010, provides that the court may frame the issues from all or any of the following materials—

> a. *allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;*
>
> b. *allegations made in the pleading or in answers to interrogatories delivered in the suit;*
>
> c. *the contents of documents produced by either party.*

95. It is therefore clear that issues in a suit arise, from pleadings or evidence both oral and documentary. However, issues in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The need for pleadings to be as precise as possible cannot be doubted. In *M N M vs. D N M K & 13 Others,*[52] it was held that:-

> *"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:*
>
>> *"Cases must be decided on the issues on the record. The court has no power to make an*

order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."

Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:

"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However, that was clearly not the case in this appeal."

96. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[53]

97. The *ex parte* applicant never prayed for an order to nullify the contract in question. It is trite law that parties are bound by their pleadings. It is beyond doubt that no relief will be granted by a court unless it is founded on the pleadings. It is not open to the court to base a decision on an un-pleaded issue unless it appears from the course followed at the trial that the un-pleaded issue had been left to the court for decision in the matter at hand.

98. Even if I were to entertain the issue and be persuaded to make a determination on the validity of the said contract, there is yet another challenge. The beneficiary of the contract is not a party in this case. Evidently, nullifying the contract, will affect the contract beneficiary, yet it is not a party in this case. To me, such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing. The law in cases of this nature was authoritatively laid down by the Supreme Court of India in *Prabodh Verma vs. State of U.P*.[54] and Tridip *Kumar Dingal vs. State of W.B*.[55] The Indian Apex Court held that if a person challenges a selection process, successful candidates or at least some of them are necessary parties.

99. 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.

100. I find it appropriate to refer to the principle of natural justice as enunciated by the Supreme Court of India in *Canara Bank vs. Debasis Das*.[56] I may profitably reproduce the same here below:-

"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...."

101. 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.

102. 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.

103. 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.[57] Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[58]

104. The Supreme Court of India put it succinctly in *J.S. Yadav vs State of U.P. & Anr*[59] 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..."

105. The submissions by the *ex parte* applicant's counsel are graphically clear that the signing of the contract between the Interested Party and Myland Laboratories Limited is under challenge. However, the said issue, though pertinent is not pleaded in the pleadings. In addition, the beneficiary of the contract is not a party in this case. There can be no shadow of doubt that it was a necessary party in this case. The first defect in this application is the failure to amend the application to join the beneficiary of the impugned contract. A court ought not to decide a case without the persons who would be vitally affected by its judgment being before it.

106. Much as I am persuaded by the arguments presented by the *ex parte* applicant's counsel in its submissions that the contract signed between the Interested Party and Myland Laboratories Limited is illegal, that is the furthest I can pronounce myself. <u>*There is no prayer before me to declare the contract null and void.*</u> Much as I may be tempted to make such a pronouncement, I restrain myself from doing so

because the beneficiary of the contract is not a party in these proceedings. Whereas the court cannot condone the said illegality, in the same vein, this court hoists high to the constitutionally guaranteed right to be heard and restrains itself from passing an order that would potentially affect a party who has not been heard by the court.

107. In view of my analysis and conclusions enumerated above, the conclusion becomes irresistible that this application must fail. Accordingly, I dismiss the *ex parte* applicant's application dated **24th** April 2019 with no orders as to costs.

Signed and Dated and Delivered at Nairobi this **4th** day of **November** 2019

John M. Mativo

Judge

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[1] Act No. 33 of 2015.

[2] Act No. 20 of 2013.

[3] L.N. 17/2000.

[4] Cap. 446, Laws of Kenya.

[5] Act No.20 of 2013.

[6] Act No. 4 of 2015.

[7] {2014} e KLR.

[8] {2016} eKLR.

[9] Misc. App No. 293 of 1993

[10] {2012} eKLR Civil Appeal 145 of 2015.

[11] {2016} e KLR.

[12] {2018] eKLR.

[13] {1995} 1 W.L.R. 1037, Court of Appeal (England and Wales).

[14] Ibid, pp. 1049–1050.

[15] {2008} 4 S.L.R.(R.)

[16] p. 159, para. 17.

[17]{1983} Q.B. 600, C.A. (England and Wales).

[18] Ibid, pp. 635–637.

[19] {1995} 1 W.L.R. 759, H.L. (UK).

[20] Ibid, p. 780

[21] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11.

[22] The concept of bid responsiveness is used most often in relation to compliance with bid formalities.

[23] Hoexter 2012: 295.

[24] *Xantium Trading 42 (Pty) Ltd vS South African Diamond and Precious Metals Regulator and another* {2013} JOL 30148 (GSJ) para 25.

[25] Para 2.48 of the World Bank Procurement Guidelines. The Guidelines makes use of the term "bid" as opposed to the term "tender".

[26] US FAR 14.405. Also see the rest of the Regulation for examples of minor informalities or irregularities.

[27] Cibinic and Nash, Formation of Government Contracts 544

[28] Cibinic and Nash Formation of Government Contracts 545.

[29] Cibinic and Nash Formation of Government Contracts 557.

[30] Ibid.

[31] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[32]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

[33] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[34] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[35] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

[36] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[37] {1985} AC 374.

[38] 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

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

[40] {2015} eKLR.

[41] {2017} e KLR.

[42] {2017} e KLR.

[43] {2018} e KLR.

[44]2014 (2) SA 228 (CC).

[45] *Affordable Medicines Trust and others v Minister of Health and others* {2005} ZACC 3; 2006 (3)

SA 247 (CC) at para 75.

[46] 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.

[47] Act No. 4 of 2015.

[48] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.

[49] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[50]See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].

[51]{2015} e KLR.

[52] {2017} e KLR.

[53] See Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385 and Standard Chartered Bank Kenya Limited vs. Intercom Services Limited 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[54] {1984} 4 SCC 251.

[55] {2009} 1 SCC 768.

[56] {2003} 4 SCC 557.

[57] Kioa v West (1985), Mason J

[58] See *Onyango v. Attorney General*,[58] ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another,**[58]** at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party wereto be prejudiced or affected without the party being afforded an opportunity to be heard."*

[59] {2011} 6 SCC 570.