REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 589 OF 2017

IN THE MATTER OF AN APPLICATION BY LORDSHIP AFRICA LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF TENDER NO.NCC/UR & H/T/514/2016-2017 REQUEST FOR PROPOSAL (RFP) FOR THE URBAN RENEWAL AND REDEVELOPMENT OF PHASE 2- NGONG' ROAD ESTATE THROUGH JOINT VENTURE PARTNERSHIP

AND

IN THE MATTER OF A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN RESPECT OF AN APPLICATION FOR REVIEW OF THE DECISION BY THE NAIROBI CITY COUNTY TO AWARD EDERMAN PROPERTY LIMITED THE TENDER.

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015.

AND

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

IN THE MATTER OF ARTICLES 10, 47,227 OF CONSTITUTION OF KENYA.

BETWEEN

LORDSHIP AFRICA LIMITED.....EX-PARTE APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

NAIROBI CITY COUNTY.....1ST INTERESTED PARTY

EDERMA PROPERTY LIMITED.....2ND INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 31st October, 2017, the exparte applicant herein **LORDSHIP AFRICA LIMITED** seeks from this court the following judicial review and other orders:

> ***a. Certiorari to remove into the High Court and quash the decision of the Public Procurement Administrative Review Board dated 11th September 2017 handed down in Application No. 78 of 2017.***

b. <u>Certiorari</u> to remove into the High Court and quash the decision of the Nairobi City County dated 2nd August 2017 to award Tender No. NCC/UR&H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership to Ederman Property Limited.

c. ***<u>Certiorari</u> to remove into the High Court and quash the entire procurement proceedings with respect to Tender No. NCC/UR&H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership.***

d. ***<u>Mandamus</u> to compel the Nairobi City County to commence a fresh procurement process with respect to Tender No. NCC/UR&H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership.***

e. Costs of the application to be provided for

2. The notice of motion is predicated on the grounds stated in the statutory statement and verifying and supplementary affidavit sworn by **JONATHAN JACKSON** the Director of the exparte applicant.

3. The Applicant asserts that it is a leading international real estate development and investment company based in Kenya.

4. The exparte applicant's case is that sometime in February 2017, the 1st Interested Party herein Nairobi City County published invitation in the local dailies for the submission of bids in respect of **Tender Reference Number NCC/UR&H/T/514/2016-2017** being a Request for Proposal **(RFP)** for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership as per the annexed copy of Tender Notice marked **JJ-1.**

5. The applicant being an interested bidder submitted its bid on 10th March 2017 within the timelines stipulated and that in accordance with the tender documents and requirements, the applicant submitted a complete set of mandatory requirements, being the technical bid, the financial bid, and the bid security in the sum of shs 10,000,000.

6. It is alleged that tenders were opened on 21st April 2017 at 12.00 noon in the presence of the respective bidders and or their representatives.

7. The applicant asserts that the 1st interested party (Procuring Entity herein) **NAIROBI CITY COUNTY** was expected, in accordance with Section 126(3) of the Public Procurement and Asset Disposal Act, 2015 to undertake the evaluation exercise of the bids to determine their responsiveness within 21 days of the opening of the bids.

8. However, that upon submitting its bid and attending the tender opening, the applicant never heard from the Procuring Entity either within 21 days stipulated under the law or at all and that in July 2017, the applicant learnt that the tender had allegedly been awarded to the 2nd interested party **EDERMAN PROPERTY LIMITED** in unclear circumstances.

9. The above alleged situation prompted the applicant through its advocates on record to write to the County Secretary of the Procuring Entity seeking clarification as to the circumstances under which the tender was allegedly awarded to the 2nd interested party.

10. It is claimed that to date the said letter has never received a substantive response from the Procuring Entity, but that by a letter dated 25th August 2017 which was nearly a month later, the 1st interested party Procuring Entity denied ever receiving the letter of 28th July 2017 from the applicant's counsels.

11. The exparte applicant further claims that on 15th August 2017, the applicant collected a notification from the Postal Corporation of Kenya(PCK), a notification dated 14th August 2017 to the effect that there was a postal mail at the applicant's Box No. 47655-00100 Nairobi GPO and that the exparte applicant should collect the mail.

12. That it was on collecting and opening the mail from the Post Office on 15th August 2017 that the exparte applicant learnt that it was a notice of regret from the 1st interested party (Procuring Entity) dated 2nd August 2017 informing the exparte applicant that the latter's bid was unsuccessful, which notification contained no reasons or explanation as to what exactly in the bid was incomplete and or the non-responsive. The applicant claims that this was contrary to the express provisions of **Sections 87(3) and 126(4)** of the PPAD Act which stipulates that **a losing bidder should be provided with reasons as to why its bid was not successful**. Further, it was claimed that such notification must be simultaneous with the notification to the successful bidder.

13. In this case, it was alleged by the applicant that the Procuring Entity used different means to communicate its decision to the successful and unsuccessful bidders such that the successful bidder was officially informed of the award on 2nd August 2017 by hand delivery notification while the applicant herein learnt of the award /decision of the procuring entity 2 weeks later by which time a contract was about to be executed.

14. It was claimed that the chosen mode of communicating to the applicant the outcome of the tendering process by postal means was deliberately calculated to block the applicant from seeking remedies stipulated in **Section 167** of the Act and in total disregard of Section **176(1)** of the Act by withholding notification to an unsuccessful bidder.

15. It is claimed that the breaches complained of above undermine the guiding principles set out in Section 3 of the PPAD Act, Article 10 of

the Constitution and Article 227 (1) of the Constitution on good governance, integrity, transparency and accountability.

16. It is further asserted by the applicant that the Procuring Entity's conduct is tainted with opaqueness, lack of transparency and breach of the PPAD Act and the Constitution and hence the filing of the Request for Review was filed on 28th August 2017 with the Review Board (respondent) seeking for annulment of the procurement process and seeking for commencement of fresh procurement process.

17. It was further claimed that upon such filing of the Request for Review on 28th August 2017 which was the 14th day from the date of notification of regret on 14th August, 2017, and the Review Board notifying all the parties that no contract should be entered into, the 2nd interested party filed replying affidavit claiming that a contract had already been entered into (executed) with the Procuring Entity for a sum of shs **19,698,417,830 (billion) on 17th August 2017**.

18. That on 8th September 2017 the request for review was heard and judgment reserved for 11th September 2017 when the respondent Review Board found that ***it lacked jurisdiction to hear and determine the Request for Review because a contract had already been entered into between the 1st interested party Nairobi City County (procuring entity) and the 2nd interested party, Ederman Property Limited successful bidder; and secondly, that the request for review had been filed out of time hence the entire request for review was struck out for want of jurisdiction, without considering the same on its merits.***

19. According to the exparte applicant, the Review Board should not have declined jurisdiction because the law is clear that a contract would only be valid if it was entered into in accordance with section 134(2) of the Public Procurement and Asset Disposal Act, 2015 which mandates that the accounting officer must seek clearance of the Attorney General prior to the signing of a contract whose sum is in excess of **shs 5 billion** and that such contravention is an offence under Section 176(1) of the Act.

20. In addition, it was averred that the respondent's findings on the question of time running for the purposes of filing of the request for review was contrary to Section 3(5) of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya which stipulates the time that a person is deemed to have been served by post.

21. Finally, the applicant claimed that the Review Board proceeded to grant the Procuring Entity a go ahead to conclude the procurement process with the 2nd interested party contrary to the provisions of the law hence this challenge.

The Respondent's case and replying affidavit

22. The Respondent Review Board filed a replying affidavit sworn by Henock Kirungu, the Respondent's Secretary contending that on 28th August 2017, the Respondent received the *ex parte* applicant's Request for Review challenging the award of **Tender Number NCC/UR&H/T/514/2016-2017 for the Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ng'ong Road Estate through Joint Venture Partnership.**

23. That upon receiving the Request for Review, he immediately directed that the 1st Interested Party herein procuring entity be served and notified of the pending Review as required by the provisions of section 168 of the Public Procurement and Asset Disposal Act, 2015.

24. That upon service with the Request for Review, the 1st Interested Party filed a response in opposition to the Request on 5th September 2017.

25. That the Respondent heard the parties on 8th September, 2017, considered their pleadings and submissions, determined the application for review and delivered its ruling on 11th September, 2017 after taking into account the Request for Review together with the supporting affidavit sworn by **Jonathan Jackson** on 28th August, 2017 as well as the Replying Affidavit dated 1st September, 2017 sworn by one **Patrick Mwangangi** on behalf of the 1st Interested Party and the one sworn by one **Ze Yun Yang** on 7th September, 2017 on behalf of the 2nd Interested Party together with all the documents supplied to it by the procuring entity.

26. That the Respondent in determining the Request for Review by the *ex parte* applicant, identified the following issues for determination namely:

> ***i. Whether the Board has the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the same was filed out of time contrary to the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act.***
>
> ***ii. Whether the Board is precluded from hearing and determining the Request for Review under the provisions of Section 167(4) (c) of the Public Procurement and Asset Disposal Act.***
>
> ***iii. Depending on the Boards determination of issues (a) and (b) above:-***
>
> ***iv. Whether the evaluation of the subject tender was carried out within the prescribed evaluation period of 21 days set out under the provisions of Section 126(3) of the Public Procurement and Asset Disposal Act and related to this issue whether the evaluation and the award of the subject tender was done within the tender validity period for this tender.***
>
> ***v. Whether the Applicant was unfairly disqualified at the preliminary evaluation stage.***
>
> ***vi. Whether the Applicant was notified of the outcome of its tender pursuant to the provisions of Section 126(4) of the Public***

Procurement and Asset Disposal Act.

vii. Who should bear the costs of this Request for Review.

27. That the Respondent in in its decision delivered on 11th September, 2017 found that it did not have jurisdiction to hear the Request for Review and could therefore not determine the same on merit.

28. That the Respondent's finding on jurisdiction was based on the fact that the *Request for Review had been filed out of time in contravention of section 167(1) of the Public Procurement and Asset Disposal Act as well as the fact that a contract had already been entered into between the 1st Interested Party and 2nd Interested Party thereby bringing the said Review within the provision of section 167 (4) c of the Act.*

29. That the Respondent having been notified that a contract had already been entered into between the 1st and 2nd Interested Parties, it did not have the mandate to entertain the Review proceedings, after the Verifying Affidavit sworn by Jonathan Jackson on 25th September 2017 revealed by the 2nd Interested Party that a contract had already been entered into and annexed a copy of the same.

30. That therefore the present application is misconceived as a contract has already been entered into between the 1st interested party and 2nd interested party and that the application lacks merit and should therefore be dismissed with costs to the Respondent.

The 1st interested party's case and Replying Affidavit

31. The 1st interested party who is the procuring entity **Nairobi City County** filed a detailed replying affidavit sworn by **PATRICK MWANGANGI** the Head of Supply Chain Management Services of the 1st Interested Party contending that the Application by the exparte applicant is frivolous, misconceived, vexatious and otherwise an abuse of Court and legal process and ought to be dismissed with costs.

32. According to the 1st interested party, the Ex-parte Applicant deliberately distorted and misrepresented material facts relating to the subject matter before this Court with intent to mislead this Court, obstruct lawful tender process and vex the 1st Interested Party without any lawful cause.

33. That the 1st Interested Party published a public invitation on or about 27th February, 2017 in the Standard Newspaper and its website at https://www.nairobi.co.ke to submit bids for Tender Reference Number **NCC/UR&H/T/514/2016-2017** for the Urban Renewal and Redevelopment of Phase 2 - Ngong Road Estate through Joint Venture Partnership.

34. That in light of the bid invitation, all interested eligible bidders were directed to obtain the Tender documents from the 1st Interested Party's Office, particularly the office of the Director of Procurement or alternatively download the said documents from the 1st Interested Party's website.

35. That as per the admission by the Ex-parte Applicant in its Affidavit, the opening and registration of bids took place on **21st April, 2017** at 12:00 noon in the presence of the Bidders' representatives, the 1st interested party's representative and in accordance with the instructions contained in the request for proposal document which was attached as **AnnextureJJ-1** of the Ex-parte Applicant's Affidavit in the Application and that RFP Document setting out clear guidelines for the parties prior to entering into the Bidding process.

36. That the Ex-parte Applicant herein and its representative were registered into the Tender Register during the bid opening as having submitted one bid for the tender as shown by copy of the Tender Opening Minutes held on 21st April, 2017 annexed.

37. That pursuant to Clause 1.5 of the RFP document, all interested bidders were required to submit a complete set of Mandatory Requirements, Technical and Financial Bid documents, accompanied by a Bid Security of Kshs. 10,000,000/=issued in favor of the contracting Authority in the form of an unconditional and irrevocable bank guarantee issued by a Kenyan bank (or an internationally recognized bank) registered with the Central Bank of Kenya.

38. That further, clause 3.2.1 of the RFP document on instructions to bidders stated as a mandatory requirement that Bidders were reminded to take note that only bids meeting the following mandatory requirements will be evaluated;

i. Bid security for the project in accordance with Annex A (Appendix to the instructions to Bidders) and standard Form IX.

ii. Paragraph 5 of the said Standard Form IX 'Form of Bid security" clearly states in part that this guarantee will remain in force up to and including thirty (30) days after the period of Bid validity.

39. That clause 3.11.1 of the RFP document on Bid validity, the subject of this Court's determination explicitly stated that the Bid shall remain valid and open for acceptance for a period of ninety (90) days from the date of the Bid Opening or extension of Bid opening and that the Bid opening took place on 21st April, 2017, a fact not denied by the Ex-parte Applicant.

40. Further, that Clause 3.12.3 of the RFP document provided that any Bid not accompanied by the requisite Bid Security as per clause 3.12.1 would be rejected by the 1st Interested Party as non-responsive. Further, that clause 3.12.2. provides inter-alia that; *"…the Bid Security shall be valid for at least one Hundred and twenty (120) days from the date of Bid opening or from the extended date of Bid opening."*

41. That the 1st interested party upon receipt of the Bids, embarked on the process of evaluation of the submitted Bids as is required by Law under Section 126 (3) of the Public Procurement & Assets Disposal Act, 2015 so as to ascertain their responsiveness with the set out mandatory requirements of the RFP document.

42. That pursuant to the foregoing, the 1st interested party conducted a Technical Evaluation exercise on the tender on both 03rd and 04th May, 2017 in order to make a finding on their responsiveness within the time period of One Hundred and twenty (120) days of the opening of the Bids stipulated in the RFP document as shown by an annexed a copy of the minutes of the Technical evaluation for tender & attendance lists of members in attendance of the Meeting held on 03rd& 04th May, 2017 at the Procurement Boardroom marked "PM 3A & B" respectively.

43. That it was during the said exercise that the Ex-parte Applicant's "**Bid Security**" from National Bank of Kenya was found to be for the period between **21st April, 2017** and **14th July, 2017** thereby reducing the validity period of the Bid Security to eighty five (85) days as against the Ninety (90) days, being the required period to determine responsiveness within the period of opening of the Bids under **clause 3.11** of the RFP document thus rendering the Bid unenforceable, as shown by an annexed copy of the Tender Opening Record, RFP Bid opening marked "PM 4."

44. That further, it was an express condition of the RFP document under **clause 3.14**, sub titled *"No Alternative Offers",* more particularly **Clause 3.14.2** that provides inter-alia that; *"The Bidder shall not attach any conditions of its own to its bid. Any Bidder who fails to comply with this clause shall have its Bid declared non-responsive and will be disqualified."*

45. That the Ex-parte Applicant with full knowledge of the foregoing provision on no alternative offer, in submitting its Bid indicated that the *Mark-up payable to the 1st interested party ought to have been 15% of the development cost of each unit, a directive which constitutes a condition attached to its bid and the Applicant's Bid was* forthwith deemed unresponsive by the 1st interested party.

46. That therefore the Applicant's Bid security failed at the preliminary stage and was found to be unresponsive as it did not meet the completeness and responsive criteria as stipulated under the RFP document and as per the recommendations of the Evaluation Committee, only the 2nd Interested party attained a combined score of 70% and qualified for financial evaluation as against the Ex-parte Applicant, as shown by an annexed copy of the Financial Bid Evaluation Report by the Tender assessing Committee dated 19th May, 2017 produced herewith and marked "PM5".

47. That notwithstanding the foregoing, the Ex-parte Applicant did not meet the mandatory requirements as explicitly provided for under Clauses 3.2.1 (a), 3.12.2, and 3.12.3 of the RFP document particularly the clauses therein which relate to the form, standard and requirement of the Bid Security and Clause 3.14.2 on the requirement of "No Alternative Offers" from Bidders.

48. That by way of a letter dated 02nd August, 2017, marked as JJ-4 of the Ex-parte Applicant's Affidavit, the 1st interested party notified the Applicant that its bid had not met the threshold by stating the reasons as-the Bidder did not meet the **"completeness and responsive criteria"** and the said notification was sent to the Ex-parte Applicant by registered post.

49. That from the said letter dated 2**nd** August 2017, the same was addressed to the Ex-parte Applicant's last known postal address declared to the 1**st** Interested Party as shown in the Ex-parte Applicants Bid documents and the latter's letter dated 10**th** March 2017 forwarding the Bid documents, produced and marked as **JJ-2** in the Ex-parte Applicant's Affidavit, which address indicated in the Interested Party's notification letter dated 2**nd** August 2017 is not disputed by the Ex-parte Applicant.

50. That on or about 04th August, 2017 the Interested Party addressed**,** delivered the said letter dated 2nd August, 2017 to the Ex-parte Applicants postal address by delivering the same to the Post Office, paying for and obtaining a certificate of posting of the letter to the Ex-parte Applicant in compliance with the law. The said letter was thus served on the date of delivery and receipt by the Post office and not 14th or 15th August as purported by the Ex-parte Applicant.

51. That the allegation by the Ex-parte Applicant that it did not hear from the 1st interested party upon tendering in their Bid and or that the communication was selective is false, vexatious and intended to mislead this Court. Further, that it is also clear that there was no breach of **Section 3 (5)** of the Interpretation and General Provisions Act, Cap 2 as alleged by Ex-parte Applicant or at all.

52. **THAT** all bidders also received communication from the 1st interested party, particularly the communication to both the successful and unsuccessful bidders was made 02nd August, 2017 vide letters dated the same date and delivered in the same manner and at no point in time did the 1st interested party withhold information of the unsuccessful party, the Ex-parte Applicant herein as is purported in paragraph 14 of his Affidavit or at all.

53. That subsequent to notifying the successful and unsuccessful bidders of the tender award and results of process, the 1**st** Interested Party proceeded to execute the Contract for the tender with the Successful Bidder on **17th August, 2017** as there was no Review or notification of Request for Review thereof against the Award with the Respondent by any of the Bidders as is required by **Section 167 (1)** of the PPAD Act or at all.

54. That it is therefore self-defeating, an afterthought, approbation and reprobation for the Ex-parte Applicant to allege that in the month of July, 2017, they learnt that the tender had been awarded to the 2nd interested party and at the same time purport to state that the cause of action herein arose on 15th August 2017.

55. That the above said allegation by Ex-parte Applicant is ipso facto not only an admission of malpractice, evidence of corruption, undue influence, procedural or unlawful interference with the procurement process contrary to the statutory law considering that the 1st interested party had not awarded the subject tender at the time the Ex-parte Applicant alleges to have learnt of the Award. The 1**st** Interested Party however denies in toto having awarded the tender in the month of July 2017 as alleged or at all and put the Ex-parte Applicant to strict proof.

56. That, it follows that the Ex-parte Applicant by its own plea admits that it knew of the decision awarding the Tender to the 2nd Interested Party in July 2017 hence should have filed a review within 14 days from the said time as required by the law. Notwithstanding that, the 1st interested party maintained that the notification dated 2**nd** August 2017 was served upon the exparte applicant in accordance with the law, and that by reason the applicant's own pleas/disposition on oath at paragraphs 7-10 of the Affidavit, the Ex-parte Applicant is clearly estopped from alleging that the cause of action arose or came to its knowledge on 14**th** or 15**th** August 2017.

57. That that the Application is tainted with illegalities, otherwise an abuse of legal and Court process intended to unlawfully give the Ex-parte Applicant a second bite of the cherry without any justifiable cause by cancelling a tender process conducted in accordance with the law and concluded with award of the Tender to the successful Bidder, being the 2nd Interested Party.

58. That the tender process herein, the Award to the 2nd Interested Party and consequent Contract thereof was fair, transparent, equitable, competitive and cost effective as required by the relevant laws and the Constitution**.**

59. That on or about 28th August 2017**,** the Ex-parte Applicant filed a request for review Number 78 of 2017 with the Respondent albeit out of time contrary to **section 167(1)** of the PPAD Act after a contract had been signed between the 1st and 2nd Interested Party and the Review Board notified and invited parties to a hearing on 08th September, 2017, a fact not contested by the Ex-parte Applicant.

60. That having considered the matter, the law and submissions of all parties herein, the Board made its decision on 11th September, 2017 striking out the Request for review Application for reasons that the 1st& 2nd Interested Parties had already entered into a contract on 17th August, 2017 as a result of which, the Board lacked jurisdiction to hear the Application. Further, the Board noted that the Application for review was filed out of time contrary to the law.

61. That the Respondent was well informed of all the facts and issues, including the provisions of the law, regulations therein, observed rules of natural justice and the Constitution in executing its mandate hence the Respondent's decision on the matter is sound and compliant with the law and that the Ex-parte Applicant had not demonstrated how the Respondent erred in law and or caused miscarriage of justice.

62. According to the 1st interested party, the Contract signed between the 1st and 2nd Interested Parties is lawful and that therefore the Ex-parte Applicant's allegation that the same is in contravention of provisions of Section 134 (2) of the PPAD Act, is misconceived, devoid of any legal or factual basis and an afterthought.

63. The 1st interested party further contended that the alleged reliance on section 134(2) of the PPAD Act by the Ex-parte Applicant is an afterthought and abuse of Court process as the same was not pleaded, conversed and or submitted in the Request for Review before the Respondent and that therefore the instant proceedings being a review from the decision of the Respondent under *section 167(1) as read together with section 175(1) of PPAD Act*, it is not open for the Ex-parte Applicant to introduce new grounds or matters not argued before the Respondent.

64. The 1st interested party further contended that in any event:

a) the subject property has a history dating way back to 11th July, 2015 and vide a letter dated 17th October, 2016, reference Number NCC/CA/GA/112/140/2016 addressed to the Attorney General, the 1st Interested Party sought legal interpretation of the announcement published by the Public Procurement Oversight Authority (hereafter on 30th June, 2016 regarding the operationalization of the new legislation as against transactions commenced before the commencement date of the Act being 7th January, 2016.

b) That by a letter dated **26th October, 2016**, reference Number AG/CONF/5/35/1, the Attorney General advised the 1st interested Party that the provisions of Section 134 (2) of the PPAD Act relating to the Attorney General's clearance of contracts of a value exceeding Kenya shillings Five Billion (Kshs. 5,000,000,000.00/=) prior to execution do not apply to the subject transaction for reasons that the said section is not among the transitional provisions and thus concurred with the directions of the Public Notice by PPOA. That in response to the above referenced letter, the 1st Interested Party by a letter dated 03rd November, 2016 reference Number NCC/CA/GA/113/145/2016 confirmed and stood guided by AG's advise that indeed the transactions namely, Pangani Estate, Old Ngara Estate, Ngong Road Staff Estate, New Ngara Estate, Uhuru Estate, Suna Road Estate and Jevanjee Bachelors' City County Estate were not subject to Section 134 (2) of the PPAD Act, as shown by a copy of the letter dated 03rd November, 2016, reference Number NCC/CA/GA/113/145/2016 annexed.

c) That following the foregoing circumstances, the contract entered into by the 1st and 2nd Interested Parties, the subject of this Court's determination was and is legal in nature and binding on the parties and this Court should not be invited to question its legality and or quash the same for reasons that the transaction is not affected by Section 134 (2) of the PPAD Act.

d) That the illegalities alleged by the Ex-parte Applicant as forming the contract herein are only hypothetical and ignorant of the Ex-parte Applicant hence, the same be dismissed with costs.

65. It was further contended by the 1st interested party that following the advice given by the Attorney General in regard to the implication of **Section 134 (2) of the PPAD Act** on the transaction**,** it was clear that the tender was not affected by the said provision and as a result, the 1st interested party awarded the partnership contract to the 2nd interested party.

66. Further, that in a letter dated 18th October, 2017, Reference Number NCC/CA/GA/82/076/2017, the Governor of the 1st interested party notified the office of the Attorney General of the position taken on the transaction pursuant to the advice given by the Hon Attorney General and sought clarity as to whether the Attorney General's Circular No. 1/2016 titled "Guidelines on clearance of procurement contracts by the AG under section 134(2) of the PPAD Act & Section 5 of the Office of Attorney General Act" did not apply to the said transaction too.

67. It was further contended by the 1st interested party that the foregoing clarification was sought on ground that the funds for the project for which the tender was awarded did not form public funds as stipulated in the Attorney General's Circular No. 1/2016, referenced and needed confirmation that the circular was not applicable to the contract.

68. That in a subsequent letter dated 19th October, 2017 reference Number NCC/CCA/GA/82/076/2017, the Governor of the 1st interested party reiterated the contents of the letter dated 18th October and the basis for the clarification in view of the implementation of the contract that was signed for purposes of signifying conclusion of the procurement process as required by the PPAD Act.

69. In addition, it was contended that in response, the office of The Attorney General vide a letter dated **31st October, 2017, reference Number AG/CONF/5/35/1 VOL.I responded in detail to the concerns raised by the 1st interested party and confirmed again** that the transaction was exempted from the provisions of section 134 (2) of the PPAD Act.

70. It was further contended that the letter dated 21st September, 2017 from one Mr. Tom Odede of the Attorney General was written in total disregard of the above referenced letters from the same office at the instance of the 1st interested party and that the same was issued on a without prejudice basis and cannot form basis of the Ex-parte Applicant's Claim in law.

71. The 1st interested party further contended that notwithstanding the foregoing, the said letter dated 21st September 2017 is ultra vires the instructions and information given and opinion sought from the Attorney General; and that the 1st Interested Party has never at anytime stated, found and or informed the Attorney General that the contract herein was executed in contravention of the substantive and procedural law, communicated to the 2nd Interested Party to follow the laid down procedures in execution of the contract and or advised the latter to await it's communication on the matter as alleged in the said letter or at all.

72. Mr Mwangangi further deposed that the said allegations in the said without prejudice letter are not supported by or refer to any particular evidence of letters by the 1st Interested Party to the Attorney General alleged or at all; and that the letter dated 31st October 2017 by the Attorney General produced as PM-12 sets out the history of correspondences between the 1st Interested Party and the Attorney General and does not mention any letter by the 1st Interested Party to the Attorney General alleging that the tender process or contract herein is illegal.

73. It was therefore contended that the Ex-parte Applicant's Application is made in bad faith, is devoid of merit, frivolous and only intended to harass, vex and taint the credibility of the 1stInterested Party's mandate and functions, whilst eroding the public's confidence in tender and bidding processes without any just cause.

74. The 1st interested party further contended that the instant Application is bad in law, not deserving of any remedies as the same was filed with the sole aim of delaying and or preventing the implementation of the contract entered into by the 1st and 2nd interested parties and that the 1st interested party would be unduly hampered in the performance and execution of their constitutional and statutory duties thereby adversely impacting on service delivery to the members of the public.

75. The 1st interested party urged the court to dismiss the exparte applicant's Notice of Motion dated 31stOctober, 2017 with costs to the 1st interested party**.**

The 2nd Interested party's case-Replying affidavit

76. The 2nd interested party Ederman Limited and who is said to be the successful bidder in the subject public procurement process subject of these judicial review proceedings and who has allegedly already signed a contract for the impugned tender with the procuring entity Nairobi City County, filed a replying affidavit sworn by its Managing Director **Mr Ze Yun Yang** contending **inter alia** that the applicant has not satisfied the criteria for lodging of these proceedings because it has not demonstrated that it is a candidate or tenderer who claims to have suffered or risks to suffer loss or damage due to breach of a duty imposed on a Procuring Entity as stipulated in Section 167(1) of the Act.

77. It is also contended that the applicant did not provide a bid security valid for 90 days and instead provided a bid security valid for only 85 days contrary to clause 3:11 of the Request for Proposal hence the applicant was never qualified to succeed in the tender.

78. In addition, it was contended that contrary to Clause 3.14.2 of the Request for Proposals, the applicant was disqualified for including a set of conditions accompanying its bid, and that no challenge has been made to the above matters.

79. It was contended that the exparte applicant instead of filing a request for review in July 2017 upon becoming aware of the award of the tender, chose to write a letter contrary to Section 167(1) of the Act which allows a request for review to be lodged at any time.

80. Further, that the Review Board had no jurisdiction to entertain the request for review as the contract had already been executed as stipulated in Section 167(1) of the Act. That in this case the contract validity period was 14 days from 2nd August 2017 hence the contract had to be signed on 17th August 2017 before 19th August 2017 in accordance with Section 135(3) of the Act.

81. The 2nd interested party contended that upon signing of the contract, performance security of shs 2,987,846 was paid as stipulated in Section 142 of Act and so far, shs 40 million has been expended for mobilization process to ensure breaking ground for the project.

82. It was further contended by the 2nd interested party that under Section 87(1) (2) (3) of the Act, there is no requirement for the Procuring Entity to notify the bidders in the same manner simultaneously and that under Section 126(4) of the Act, same time notification is not simultaneous but that in this case, the successful and unsuccessful bidders were notified on the same day.

83. It was further deposed that there is no evidence to support the allegation that the first notification sent to the applicant by Postal Corporation of Kenya was on 14th September 2017 and not earlier. It was also deposed that in law, time begun to run from the day after the posting of the notification which was 5th August, 2017 as held by the Review Board.

84. The second interested party's Managing Director further deposed that the Procuring Entity has no control over Postal Corporation of Kenya hence it could not have manipulated the delivery of the notification to the exparte applicant and that no offence under Section 176(1) (k) of the Act was committed.

85. It was further contended that if the exparte applicant had noticed manifest breach of the law by the Procuring Entity, it did not have to wait until the notification of the award was made before seeking for review. That the contract in question does not involve government spending hence the provisions of Section 134 of the Act on the authorization by the Attorney General with regard to contracts in excess of 5 billion does not apply to this case as there is no money payable by the government to the successful bidder.

86. Further, that in this case, the notification having been posted, properly addressed to the applicant in accordance with Section 3(5) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, it has not been proved that there was any breach.

87. That if implementation of the contract is halted, the 2nd interested party shall suffer huge loses yet the exparte applicant has no locus standi before this court having not qualified to be awarded the tender or to commence proceedings before the Review Board hence the notice of motion should be dismissed with costs.

The exparte applicant's further affidavit

88. The exparte applicant swore a further affidavit in response to the replying affidavits sworn by the respondent and the two interested parties namely: Henock K. Kirungu; Patrick Mwangangi and Ze Yun Yang.

89. **On the Respondent's Replying Affidavit it was submitted that the** Respondent's Replying Affidavit merely sets out the history of the matter before the Public Procurement Administrative Review Board and fails to address the issues raised in these proceedings as to the legality, reasonableness and propriety of the decision of the Board.

90. Further that by merely rehashing what transpired before the Board, the Respondent's Replying Affidavit has not provided much assistance to this Court or to the parties, as there is not much controversy as to what actually transpired before the Board.

91. That to the contrary, the crux of the matter is really whether what transpired during the Tender process, and following which the Board declined to hear the Applicant's application for review on the merits for a perceived lack of jurisdiction, passes the threshold of legal propriety taking into consideration the values and principles espoused in Articles 10 (2) (c), 47 (1), and 227 (1) of the Constitution, as well as various provisions of the Public Procurement and Asset Disposal Act, 2015.

92. The applicant maintains that the Respondent's contention that it was entitled to get it right or wrong on the issues placed before it must be rejected. That by finding that it lacked jurisdiction to hear the Applicant's request for review, the Board's committed a fundamental error of law that gravely affected and prejudiced the Applicant's right of access to justice, the right to a fair hearing, and ultimately left the Applicant's grievances with regard to the tender process as set out in its request for review unresolved.

93. On the 1st Interested Party's Replying Affidavit, it was submitted that it in totality, amounts to a vain and desperate attempt by a procuring entity to justify and defend an otherwise flawed and botched up procurement process by all excuses possible, while dismissing the Applicant's complaints without thought and consideration to the same.

94. That The 1st Interested Party has dedicated a considerable portion of its Replying Affidavit to explaining why the Applicant's bids was found to be unresponsive, which may be summarized (that according to the 1st Interested Party) as having a bid security validity period of eighty five (85) days as opposed to ninety (90) days and having placed conditions on its bid and that for the record, the Applicant denies that its recommendation of a 15% mark-up payable to the 1st Interested Party amounted to placing a condition on its bid.

95. That the foregoing notwithstanding, what the 1st Interested Party clearly fails to appreciate, despite it being a key issue, that the notice should have been given at the same time and in the same manner as to the 2nd Interested Party and reasons for the Applicant's non-responsiveness as adjudged by the procuring entity ought to have been provided to the Applicant at the time of the notice of regret and not in response to either the request for review before the Board or in response to these proceedings.

96. That section 126 (4) of the Public Procurement and Asset Disposal Act, 2015, is clear that "*When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof.*"

97. That there is nothing in the 1st Interested Party's Replying Affidavit that even remotely suggests that section 126 (4) of the Public Procurement and Asset Disposal Act, 2015 was complied with in terms of giving notice at the same time and reasons why the Applicant's bid was not successful. That the belated (yet contestable) reasons furnished by the 1st Interested Party only serve as proof that this mandatory requirement of the law was not complied with by the 1st Interested Party.

98. That the 1st Interested Party has also offered no explanation whatsoever as to why the requirement for the tender evaluation process to be undertaken and completed within a maximum period of twenty-one (21) days in accordance with section 126 (3) of the Public Procurement and Asset Disposal Act, 2015, was not complied with.

99. That the 1st Interested Party has termed as "false, vexatious and intended to mislead the Court" the Applicant's contention that it did not hear from the 1st Interested Party until the letter of regret despite the fact that the Applicant has produced a letter dated 28th July 2017 from its Advocates to the 1st Interested Party annexure **JJ-3** in Verifying Affidavit sworn on 25th September 2017 - at pages 151 to 152) which has not been responded to date, and that it will be for the Court to determine as to whom between the Applicant and the Interested Party is misleading the Court, based on the material placed before it.

100. That the failure by the 1st Interested Party to respond to or provide the information sought by the Applicant vide its Advocate's letter dated 28th July 2017 is in breach of both Article 35 of the Constitution which provides for a right to information as well as section 68 (3) of the Public Procurement and Asset Disposal Act, 2015, and that in any event, the 1st Interested Party admitted vide its letter dated 25th August 2017 that "*any one has a right of information on any public procurement in Kenya*."

101. In response to the 1st Interested Party's contention that the Applicant should have filed its application for review from the time in July when it first heard (albeit informally) about the award of the tender to the 2nd Interested Party, it was deposed that section **167 (1) of the Public Procurement and Asset Disposal Act, 2015 provides that an aggrieved party *"may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed, "* and that t**he foregoing provision is disjunctive and not conjunctive, and it therefore follows that the Applicant was well within its rights when it sought relief fourteen (14) days after receiving the notification of award/regret.

102. That at as at July 2017, the Applicant did not have sufficient information to enable it lodge an application for review before the Board, which is the very reason why it wrote to the 1st Interested Party vide its Advocate's letter dated 28th July 2017 seeking the said information.

103. That the 1st Interested Party has glossed over the manner in which it communicated the award of tender to the parties, by simply stating, at paragraph 28 of its Replying Affidavit that the notification was "*served in accordance with the law*" instead of examining section 126(4) of the Act.

104. That during the hearing before the Board on 8th September 2017, Mr. Patrick Mwangangi on behalf of the 1st Interested Party in response to a query from the Board, confirmed that the 1st Interested Party had used different modes of communicating the award of tender to the bidders, in that the notification to winning bidder (the 2nd Interested Party) was hand delivered, while the notification to the losing bidders (including the Applicant) was sent via post. In the result, the parties receiving the notification at different times, contrary to the provisions of section 126 (4) of the Public Procurement and Asset Disposal Act, 2015.

105. That the law on when a party is deemed to have received a document via post is set out under the provisions of section 3 (5) of the Interpretation and General Provisions Act (Cap. 2) Laws of Kenya, which provides that "*where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post*."

106. That there is nowhere in the Board's decision that shows that it took into account or applied the aforesaid provision of the law in arriving at the conclusion that the Applicant was served with the notification on 4th August 2017 (the date that the notification was dispatched), and that indeed, there is no mention of the said provision anywhere in the decision.

107. That the foregoing provision allows a party to prove when it actually received a document via post so that the presumption that the party received the document "in the ordinary course of the post" would not apply to cases where a party proves to the contrary.

108. The Applicant has proved vide the annexure marked **JJ-4** in the Verifying Affidavit sworn on 25th August 2017 (at pages 157-158), that it received the notification from the 1st Interested Party on 15th August 2017. That the stamp on the call notice 45-1512139-17-122609 from the Postal Corporation of Kenya (at page 157) is dated 14th August 2017 and the Applicant avers that it collected the letter the following day i.e. 15th August 2017.

109. That in light of the foregoing, the effect of applying the "*unless the contrary is proved*" provision in section 3 (5) of the Interpretation and General Provisions Act is that the Applicant, by law and by fact, received the notification from the 1st Interested Party on 15th August 2017, wherefore the application for review lodged before the Board on the 28th of August 2017 was filed within fourteen (14) days of notification of the award to the parties. Indeed, the application for review was filed with a day to spare.

110. As to the contract purportedly executed between the 1st Interested Party and the 2nd Interested Party, it was deposed that:

a. The Attorney General, through a letter dated 21st September 2017, has indicated that the contract had not been transmitted to the office of the Attorney General for clearance in accordance with the law;

b. Though marked "*without prejudice*", the said letter does not, in law, qualify as without prejudice communication. The letter was written in response to the letter dated 13th September 2017 from the Applicant's Advocates being a request for information pursuant to Article 35 of the Constitution and section 4 of the Access to Information Act, 2016 and for the purposes of moving to Court; The response from the Attorney General cannot therefore be qualified as "*without prejudice*" as that would defeat the purpose for which the information was sought in the first place.

c. The said letter dated 21st September 2017 is signed on behalf of the Attorney General by Tom Odede, Senior State Counsel. By virtue of section 14 of the Office of the Attorney General Act, 2012, the Attorney General is allowed to delegate his functions to State Counsel, and it is not for the Applicant to enquire why the response was signed on behalf of the Attorney General as those are internal matters pertaining to the Attorney General's office which the ex parte Applicant is not privy to.

d. At any rate, it is the same Tom Odede, Senior State Counsel, whom the Attorney General has recently nominated to liaise with the County Attorney and the National Treasury in view of concerns raised by the National Treasury with regard to inter alia "*hidden fiscal obligations tied to the transaction, having regard to the Public Finance Management Act, 2012*"

e. The Guidelines issued by the Attorney General vide circular No. 1 of 2016 dated 28th January 2016, (hereinafter "the Guidelines") had the effect of providing guidance for the process of obtaining clearance for contract utilizing public funds from the consolidated fund, and indeed, the said Guidelines proceed to give an elaborate process for the obtaining the Attorney General's clearance for such contracts.

f. However, the Guidelines did not and could not have the effect of exempting or annulling the requirement for the Attorney General clearance to be sought and obtained for all contracts in excess of Kshs. 5 Billion, (regardless of whether or not they are funded from the consolidated fund) before the same are signed.

g. Section 143 (2) of the Public Procurement and Asset Disposal Act, 2015 expressly provides that *" an accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed."* The aforesaid section is couched in mandatory terms and clearly does not make an exemption to the effect that the Attorney General's clearance is not required for contracts that are not funded by the consolidated fund. To the contrary, it is clear that the Attorney General's clearance must be obtained for all contracts.

h. At any rate, guidelines are not parliamentary legislation or even subsidiary legislation. Guidelines are merely administrative directives issued for guidance purposes so as to ensure full compliance with a particular law and they cannot (neither do these particular Guidelines purport to do) nullify a statutory provision. Indeed it would be an antithesis of a Guideline if its effect was to annul or repudiate the very law in respect of which guidance is being given.

i. The suggestion that the tender process is not subject to the Public Procurement and Disposal Act, 2015 must be dismissed as erroneous, as it is clear that the first advertisement for the subject tender was published on 27th February 2017 (annexure **PM-1** in the 1st Interested Party's Replying Affidavit), and thus the subject tender falls under the aforesaid Act, which came into operation on 7th January 2016.

111. For the foregoing reasons, it was the reiterated that no clearance was sought and obtained from the Attorney General before the signing of the contract dated 17th August 2017 between the 1st Interested Party and the 2nd Interested Party which was contrary to the mandatory provisions of section 143 (2) of the Public Procurement and Asset Disposal Act, 2015, and which renders the said contract an illegality and therefore null and void *ab initio*.

SUBMISSIONS

112. The notice of motion was canvassed vide written submissions as filed by all the parties' advocates and followed by oral highlights with the exparte applicant being represented by Mr Mbaluto and Mr Amoko advocates while the respondent was represented by Miss Maina holding brief for Mr Bita and the 1st interested party represented by Mr Litoro while Miss Njeri Mucheru appeared for the 2nd interested party.

113. All counsels in their respective oral submissions reiterated their written submissions which also mirror the parties' depositions in the filed affidavits. They also relied on a plethora of case law and legal and constitutional provisions which this court has given very serious consideration, and as the submissions are a replication of the depositions and contentions which I have reproduced verbatim in this judgment above, it does not warrant repeating them here verbatim, so as to avoid verbosity.

116. Mr Amoko on behalf of the applicant and leading Mr Mbaluto relied on his client's pleadings and affidavits and written submissions and submitted that the decision of the 2nd respondent was made in error of law. It was submitted that the review Board committed an error of law in declining jurisdiction and in finding that the request for review was filed after 14 days had lapsed after the notification of the regret by the procuring entity.

117. According to Mr Amoko, there were factual determinations based on evidence supplied to the Review Board to the exclusion of the

applicant. That the document at paragraph 1 of the ruling was never availed to the applicant's counsel. He relied on various authorities including HCC Miscellaneous Application 285/2006.Rv The Institute of Certified Public Accountants of Kenya. It was submitted that in his affidavit, Mr Mwangangi never referred to service of the letter of award to the successful bidder by sending by way of registered post. It was submitted that there is no law cited on the issue of delivery of the mail but that there is presumption under Section 3 Cap 2.

118. It was further submitted that the Public Procurement and Asset Disposal Act does not authorize the mode of delivery of the letters of notification but that the applicant had proved the contrary by producing the notification dated 14th August 2017 which was collected from the post office on 15th August 2017.

119. It was further submitted that the procuring entity's replying only shows a stamp and does not affect the applicant's assertions. On the ground that the applicant's request for review was out of time and that it was aware of the proceedings by 28th July 2017 and that it wrote a letter on the same date so it should have filed the request, it was submitted that the applicant was only questioning the alleged award of a contract and that the procuring entity denied ever receiving that letter. The applicant's counsel submitted that they only sought to know whether a decision had been made. It was also submitted that the Board had noted that the Act is disjunctive.

120. The exparte applicant's counsel maintained that the decision by the review Board was irrational and illegal.

On the basis that a contract had been signed and so the Review Board was barred to hear and determine the request for review, it was submitted that the if the last day was 18th August 2017 as stated by the Board then the record shows that the contract was signed on 17th August 2017 which was breach of the law but that the Review Board never questioned that illegality. It was submitted that the issue was raised by Mr Mbaluto but that the Board said the applicant never sought to amend the pleadings. It was submitted that as the signing of the contract was illegal, the amendment was not required. Reliance was placed on the Odd Jobs case and the case of ***Jobs –vs-Mubia [1970] EA 476*** is relevant, where the Court held that:

> ***"a) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to court for decision;***
>
> ***b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."***

121. Further reliance was placed on Mapis Investment Ltd vs KRC[2006] e KLR.

122. Mr Amoko submitted that Transparency, accountability and the Rule of Law are requirements in procurement and that in this case, the Board deliberately immunized the subject tender from review hence this court should intervene to give relief. Counsel also relied on many other decisions which were filed together with written submissions.

123. Miss Maina counsel for the respondent opposed the application and relied on the replying affidavit and submissions filed on behalf of the respondent review Board on 6th November 2017. It was submitted that the applicants challenge the merits of the decision of the review board and not the process and that the applicant's challenge of the validity of the contract can only be made in a commercial court.

124. Further submissions were that If the court finds jurisdiction in the Review Board, it can only remit the matter back to the Board for reconsideration and that the respondent properly exercised the mandate so its decision should not be quashed. Counsel urged the court to dismiss the application with costs.

125. Mr Litoro advocate submitted on behalf of the 1st interested party and relied on the replying affidavit and submissions and supplementary submissions of 6th November 2017 to the effect that the 1st interested party stand s by the decision of the respondent which is sound and proper in law. Further, that the applicant at paragraph 8 of verifying affidavit concedes that they became aware of award of the tender in July 2017 and in unclear circumstances. That they also complained of not being informed of the communication.

126. It was further submitted that service of notification was effected on 4th August 2017 but that those documents were omitted from the record. However, counsel later retreated and submitted that he had been shown a complete record of the documents that he had earlier on believed were omitted from the record.

127. It was submitted that Notification of award was made pursuant to Section 3 of Cap 2 Laws of Kenya by delivering at the last known address by letter dated 2nd August 2017 and that the address used had not been denied.

128. On the issue of the signing of the contract, the 1st interested party supported the respondent's submissions asserting that it was lawful and that they had demonstrated that the contract never required the Attorney General's approval before the signing. He urged the court to dismiss the application with costs. several cases were relied on in the written submissions to support the 1st interested party's position including **Rv KRA exparte Webb Fontain Group FZ-LLC&3 others [2015] eKLR** to argue that the court should not delve into the merits of the Review Board's decision while maintaining that the Review Board had no jurisdiction in matters where the contract had already been signed and that the contract was signed in accordance with the law as stipulated in the PPAD Act, 2015.

129. Miss Njeri Mucheru counsel for the 2nd interested party submitted associating herself with submissions made by the respondent and the 1st interested party. On the submissions that the preliminary objection was made on contested facts, it was submitted that that was a matter which was never included in written submissions. It was submitted that the contrary which was required to be proved was the date on which the notification was posted.

130. On the applicant being aware of breach by the Procuring Entity on 28th July 2017, when they wrote their letter, it was submitted that the applicant should have filed their challenge to the process on the said date as stipulated in section 167 of the Act and not wait until after the process was completed

131. It was further submitted that Section 135 of the Public Procurement and Asset Disposal Act is clear that the contract ends tender proceedings and that in this case, it had to be signed within the tender validity period of 19th July 2017 hence there was no reason to wait.

132. It was also submitted that the 2nd interested party had already incurred expenses pursuant to the contract and that therefore this court can only interfere with the Board's decision if it finds it grossly illegal and outrageous. She relied on the cases of **R v Judicial Service Commission exparte Pareno[2004] eKLR and Rv PPARB &2 others Team Engineering Spa Exparte[2014] eKLR** on the scope of judicial review and maintained that the correspondence from Attorney General's office was on a without prejudice basis hence it cannot be relied on, citing **Ongata Rongai Total Filling Station Ltd v Industrial & Commercial Development Corporation[2009] eKLR.**

133. Citing the decision in Republic vs National Transport and Safety Authority & 10 others relied on by the applicant, it was submitted that the court was clear that Judicial Review orders are issued in exceptional cases and that the court can decline them even if merited. Further, that the conduct of the party applying and effect of such order must be considered.

134. It was submitted that HCC 14/2011 as cited by the applicant was not relevant to this case because the date of actual delivery of the document to the post office was not before the court unlike in this case.

135. Counsel also dismissed all the authorities Nos 3, 4, 5 cited by the applicant as being irrelevant in this case. She further maintained that there was no proof of any illegality to warrant interference with the decision of the review Board she urged the court to dismiss the applicant's application with costs.

136. In a brief rejoinder, Mr Mbaluto counsel for the exparte applicant submitted that The Act allows Judicial Review proceedings so the court can interfere with the decision and asserted that they would have no issue with remitting the matter back to the review Board for reconsideration.

137. Further, that the applicant became aware at the end of July through rumours that the award had been made to the 2nd interested party so they sought clarification. Counsel maintained that the contract is unlawful and the Attorney General made it clear that it is unlawful. It was also reemphasized that Section 132 of the Act is clear that the Attorney General's clearance is mandatory prior to signing of the contract and that there was no reason why the tender was signed on 19th August 2017 instead of 17th August 2017, which was manifest illegality to contract within the time for challenging the decision before the Review Board. He also maintained that they had demonstrated that the notification of the award was made to the applicant on 14th August 2017 and received on 15th August 2017. Counsel urged the court to allow the application dated 31st October 2017.

DETERMINATION

138. I have considered all the parties pleadings, affidavits and submissions as supported by case law and statute law and in my humble view, the main issue for determination in this matter is whether the exparte applicant is entitled to the orders sought in the Notice of motion. There are other ancillary questions that the court will endeavour to answer.

139. The first and most important question that must be answered is ***whether the Review Board committed an error of law when it declined jurisdiction to entertain the application for review because:***

> ***a. The contract was already entered into;***
>
> ***b. The application was filed outside 14 days; and that***

140. Commencing with the question No. a above, the exparte applicant asserts that the finding by the Respondent that it had no jurisdiction to hear and determine the request for review on account that a contract had been signed between the successful bidder and the procuring entity was Wednesbury irrational and an error of law because the said contract was illegal for want of approval by the Attorney General and secondly, that the contract was entered into before elapse of 14 days from date of notification of the regret by the procuring entity. On the part of the interested parties and the Review Board, it was contended that the law prohibits the Review Board from hearing and determining any request for review where the contract is already signed hence the Review Board's jurisdiction was ousted.

141. Section **167** of the Act stipulates that:

> ***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. Request for a review.***
>
> ***(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.***
>
> ***(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.***

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

(a) the choice of a procurement method;

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

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

142. From the above provisions, it is clear that the respondent's decision not to entertain the request for review was based on section 167 (4) (c) of the PPAD Act. However, for the Respondent to be said to have been deprived of jurisdiction, the contract must have been signed in accordance with section 135 of the Act.

143. Section 135 of the Act is on ***creation of procurement contracts*** and it stipulates that:

Creation of procurement contracts.

135. (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(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. [Emphasis added].

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

144. Madan, J (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC No. 1546 of 1971 (HCK) [1972] EA 525** held:

"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…….The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."

145. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the

jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction.

146. In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction. (see the decision by Odunga J in **Republic v Public Procurement Administrative Review Board& 2 Others Team Engineering Spa EX PARTE [2014]eKLR** where the learned Judge when faced with the same question of jurisdiction of the Review Board under the now (repealed) 2005Act where a contract had allegedly been signed during the request for review stated thus and added:

> ***"To this extent I agree with the decision in Anisminic Limited vs. Foreign Compensation Commission and Another Case (supra) to the effect that:***
>
> ***"It is well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."***
>
> ***"I further associate myself with the decision in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728, to the effect that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognized that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. Where therefore an ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable.***
>
> ***Section 68 of the Act provides as follows:***
>
> ***(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.***
>
> ***(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.***
>
> ***(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.***
>
> ***Therefore a contract can only be entered into within the period provided for in the notification under section 67(1) of the Act. However, whatever period of notification specified, the same can only be valid if the period stipulated is at least fourteen days from the date of giving of that notification. That notification necessarily refers to the notification in section 67(1) of the Act and that provision provides:***
>
> ***"Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted."***
>
> ***A plain reading of the said provision clearly shows that the only notification that is required for the purposes of the application of section 68(2)(c) of the Act is that to the successful tenderer. However, this interpretation is objected on the ground that it would frustrate legislative purpose since the procuring entities would simply fail to notify the unsuccessful tenderers and enter into contracts after the fourteen days of notification to the successful tenderer and hence deprive the Board of the jurisdiction to entertain the review.***
>
> ***The general law of interpretation is that where the words of statute are plain there can be no more than one construction. With respect to past enactments it has always been a principle of interpretation that considerations stemming from legislative history must not override the plain words of a statute. Therefore where it is evident that a different and wider intention inspired a later Act, the intention of the Legislature as manifested in an earlier one will be of little assistance. The law as I understand it is that for the Court to find that a literal interpretation of an enactment would lead to absurdity, the absurdity must be so plain as not to require detailed analysis in arriving thereat. For the Court to engage in an extensive analysis of the enactment in order to find whether or not the same is absurd would amount to the Court usurping the legislative powers of the authority entrusted therewith and that is not the role of the Courts. The law in my view is that a law must not be interpreted in a manner that would render it meaningless or scandalous and that it must be interpreted to give meaning to the intention of the Legislature. However where the words clearly express the intention of the Legislature there is no room for any other interpretation.***
>
> ***48. Nevertheless where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before***

a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008 it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000 and Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.

49. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognized remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder.

148. The said section 135 of the Act also stipulates that ***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.[emphasis added].***

149. From the evidence placed before this court by the procuring entity, the respondent and the interested parties, it is crystal clear that the procuring entity, after completion of the evaluation process, which process was completed outside the 21 days' period, although the 1st interested party claims that there is no requirement that the evaluation of tenders be carried out within 21 days and that the procuring entity carried out the evaluation in accordance with the criteria set out in the tender documents, **Section 126(3) of** the Public Procurement and Asset Disposal Act, 2015 mandates that ***the evaluation process must be done and the responsiveness of the bidders determined within 21 days of the opening of the bids***. The section reads: "***126(3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement."***

150. Therefore, whether or not the tender documents stipulate the 21 days, the statutory provisions must be followed since they override any other stipulations that may be in the Act. The tender documents, it must be appreciated, must accord with the Act and therefore where the court finds that clauses in the tender documents are not anchored in law, the court would not hesitate to find that such clauses violate the law and must be declared a nullity. In the same vein, a contract that violates the law cannot be allowed to be valid.

151. It is also not disputed that the procuring entity did write letters of notification to all the bidders, whether successful or not on 2nd August, 2017 notifying them of the outcome of the evaluation process. However, whereas the applicant claims that it received notification on 14th August, 2017, the respondent and all the other parties contend that as the letters of notification were posted on 4th August, 2017, that is the date of notification. Further, that therefore the contract entered into on 17th August 2017 was valid.

152. Even assuming that the letters of notification were served on 4th August 2017, the 14 days given to an aggrieved party to lodge a request for review to the Review Board would have been until 18th August, 2017 and not 17th August, 2017, when the contract was signed. Time is computed excluding the first day and including the last day. It follows that the 17th August, 2017 fell on the 13th day.

153. Therefore, the contract having been signed before expiry of 14 days on 17th August, 2017 by the Review Board declining jurisdiction on account of an already signed contract, without alluding to section 135 of the Act which is condition precedent with regard to such contracts, this court finds and holds that the other bidders who were aggrieved by the decision made by the procuring entity in respect of the subject tender were locked out in case they wished to challenge the decision or award made by the procuring entity in favour of the successful bidder were precluded from challenging that decision of the procuring entity.

154. The legislative intent in section 135 of the Act is clear that "***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.[emphasis added].***

155. It therefore follows that the consequences of signing a contract before elapse of 14 days from the date of notification are grave to the extent that such a contract would be declared null and void as the procuring entity would be undermining the law if it signed a contract before elapse of 14 days. By the same measurement, 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. Such a party would suffer the perils of the doctrine of *volenti non fit injuria* because all parties are presumed to know the law.

156. A contract entered into in contravention of the law is contrary to public policy especially where it is meant to frustrate a legislative purpose. It is illegal and the same cannot be allowed to stand. This is so for the contract subject of these proceedings.

157. Therefore, in this case, I have no hesitation in finding and holding that the respondent Review Board failed to take into account relevant matters before declining jurisdiction on account that the contract had already been entered into. It failed to first establish whether the contract had been entered into in accordance with section 135 of the PPAD Act, before declining jurisdiction.

The other ground b on jurisdiction that the respondent relied on to decline jurisdiction in the matter of a request for review is that the exparte applicant filed the request for review outside the 14 days stipulated in Section 167(1) of the Act.

158. The Review Board and the interested parties have maintained their stance that the applicant having claimed that the award was made in July 2017, it was aware of the breach much earlier and that therefore it should have filed a request for review at that moment that it learnt of the breach.

159. Section 167(1) of the Act provides that:

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

160. The Act mandates that a person who is dissatisfied with the decision of the procuring entity, or who may have suffered or risked suffering loss or damage due to breach of a duty imposed on a procuring entity may seek for administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

161. Although the respondent and interested parties claim that the exparte applicant knew about the breach in July 2017 and that therefore it should have challenged the process at that time upon knowing of the breach, the wordings of the Act give the applicant two options namely, upon learning of the breach to file a request for review or in the alternative, to challenge the award 14 days after the notification. The applicant avers that it only heard rumours that the procuring entity had already made an award in favour of the 2nd interested party but that it never had sufficient evidence to mount a challenge until after it was notified of the regret on 14th August 2017 through the Post Office.

162. The applicant also complains that the procuring entity did not notify all the participating bidders through the same medium and that whereas it was notified by post, the successful bidder was given a hand delivered letter dated the same day which then disadvantaged the applicant who received the letter late by which time the procuring entity was already in the process of entering into a contract with the successful bidder.

163. The procuring entity and the interested parties on the other hand claim that there is no requirement that all the bidders be notified simultaneously and that the letter dated 2nd August 2017 having been posted on 4th August 2017 as per the Certificate of Posting annexed, then that is the date on which notification of award and or regret was made to the bidders. It is therefore contended that the filing of the proceedings challenging the decision of the procuring entity was done out of the 14 days stipulated in law hence the Review Board had no jurisdiction to hear and determine a challenge to the notification, where the application for request for review was filed out of the 14 days.

164. On this aspect, the Review Board and Interested parties claim that the applicant by its own admission knew of the alleged breach in July 2017 when it wrote a letter to the Procuring entity seeking clarification of some issues.

165. However, this court was not shown any material evidence that as at 28th July when it wrote the letter to the procuring entity, it had evidence of breach to mount a challenge to the process. This is so because the procuring entity has clearly stated that it never awarded any tender to the 2nd interested party in July 2017 which then means that the applicant would have been chasing the wind if it filed proceedings based on the rumours that there was breach. Proceedings are initiated on the basis of verifiable evidence and not on rumours .

166. In addition, the procuring entity, despite evidence that it was served with the said letter of 28th July, 2017 never responded to the same confirming or denying the rumour hence the applicant was not enabled with any material at that stage to challenge the procurement process. In the view of this court, seeking information on a rumoured breach is not being in possession of material to sustain a claim for an alleged breach.

167. In addition, there was no evidence that the award was made in July 2017. I therefore discount that theory touted by the procuring entity and the interested parties that the applicant was aware of the breach in July 2017. Furthermore, despite the applicant seeking for information from the Procuring entity in July 2017 upon waiting for communication to no avail, it never received any response on the issues raised in the said letter which letter was received by the Procuring entity.

168. Then there is the theory advanced by the respondent and the interested parties to the effect that the applicant, like all other bidders were served with a regret notification on 4th August, 2017 vide letter dated 2nd August 2017 and posted on the same day. The procuring entity produced a Certificate of Posting of the letter of notification to the exparte applicant which indeed shows that the letter of notification was posted on 4th August, 2017. However, there was no certificate of posting of similar letters of notification to the other bidders including the 2nd interested party successful bidder, and neither did the 2nd interested party produce any notification from the Post Office to show when its letter of notification was posted and or received, to discount the exparte applicant's fears that the 2nd interested party was treated preferentially by being given a letter of notification by hand delivery thereby disadvantaging the exparte applicant who received the notification from the post office on 14th August, 2017 and filed for leave to apply for judicial review on 28th August 2017 which was on the 14th day from 14h August, 2017.

169. Although the respondent and interested parties claimed that there is no law mandating delivery of the letters of notification to the bidders simultaneously, section 126 (4) of the Act is clear that ***"When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof."[emphasis added].***

170. There is no doubt that the above section mandates notification of both successful and unsuccessful bidders **at the same time** which is simultaneous and therefore it is only logical that if the successful bidder is notified by way of hand delivery mail, the same mode of notification must apply to the notification upon the unsuccessful bidders so as not to disadvantage the other parties through delay, which action or inaction on the part of the procuring entity would clout mischief by any procurement entity to oust the jurisdiction of the Public Procurement Administrative Review Board by illegally failing or delaying notification of the award to unsuccessful bidders until signing of the contract between the procurement entity and the successful bidder is completed.

171. The **Oxford Dictionary** defines the word ***"simultaneous"*** to mean the ***"occurring, operating, or done at the same time."*** The exparte applicant maintained that the 1st Interested Party used different means of communicating its decision as to the award to the bidders with the result that the 2nd Interested Party was officially informed of the award on 2nd August 2017 while the Applicant got to know of the decision some two (2) weeks later by which time a contract had been or was about to be executed.

172. According to the exparte applicant, the chosen mode of communication by the 1st Interested Party could only have been for the sole purpose of locking out the Applicant from pursuing remedies under section 167 of the Act and that in addition to this blatant disregard of the Act, the 1st Interested Party committed an offence as proscribed under section 176 (1) (k) by withholding notification to an unsuccessful bidder.

173. The 1st interested party did not controvert the above allegation with any evidence that it posted the notification letter to the successful bidder at the same time as it did for the exparte applicant unsuccessful bidder.

174. I reiterate that albeit the Act does not state that the letters of notification must be delivered by the same mode, it is only rational that if the notification be done at the same time, then the mode of delivery of that notification be the same so as to give all the bidders equal time and opportunity for receiving notifications so that they can make decisions as to whether to challenge the award or not.

175. To deliver a notification to a successful bidder by hand and hitherto post the notification to an unsuccessful bidder would be an act deliberately designed to oust the unsuccessful bidder from challenging the decision of the procuring entity within the stipulated timeframe of 14 days since the unsuccessful bidder would have no means of knowing whether its letter of notification had been posted, to camp at the Post Office to receive its notification on the same day of posting or within 14 days of posting.

176. It is worth mentioning that the Review Board's decision should never be perceived to have been meant to give latitude to the Procuring Entity to sign a contract in favour of the 2nd interested party. That is exactly what is apparent in these proceedings.

177. Albeit the Act does not state when notification of tender award or regret is deemed to occur, the Review Board in its previous decisions on the same issue of when the notification of award is deemed to have occurred and which position was upheld by the courts, held as follows in the following cases, of the Review Board's decisions:

> **(a)Vestergaard Frandsen (SA) V The Public Procurement Supply Management Consortium AND Ministry of Health Misc. Appl. No 140 of 2007** where the court observed thus*:*
>
> ***"the Board has consistently held that time for the appeal window began to run upon communication of award or communication of failure to be awarded. The applicant has stated that it received the letter of the notification on 21st June, 2007. This has not been challenged. The fourteen days' appeal window would therefore have begun to run on that day. Therefore, the Board finds that the appeal was filed within time, and this objection fails.***
>
> **(b)** In **Postmaster General V Postal Corporation of Kenya-AM No. 43 of 2009, the Review Board held thus:**
>
> ***"the Board has held severally that the burden of proof on the issue of notification lies on the procuring entity which has a duty under section 67 of the Act, to notify. in view of the above, the Board holds that time started running on the 15th October, 2009, when the applicant's representative collected a notification letter from the procuring entity."***
>
> ***(c) In PPARB Application No 91 of 2017 Between Orad Limited and Glosec Solutions (JV) VS Kenya Electricity Generating Company Limited***, the Review Board was faced with the same question of notification of bidders and held inter alia:
>
> ***"Turning to the issue under consideration, the Board finds that the Procuring Entity opened the tenders in question on 30th June 2017 and it finished the evaluation of the tenders on 27th July 2017. The procuring entity thereafter prepared letters of notification to all the tenderers on 19th July 2017 but did not send them out to bidders for unexplained reasons until on or after 13th October 2017 when it alleges to have notified the tenderers. As to whether these letters of notification were dispatched to both the successful and unsuccessful tenders at the same time in conformity with the provisions of section 87(3) of the Act and Clause 2.19 of the Tender Document, the Board was not given any evidence to prove that the letters were dispatched but has also established from the oral submissions and the affidavits filed by the applicant and the oral statement by the interested parties that the bidders received their letters between 19th October 2017, 30th October, 2017 and others including the applicant alleged that they had not received their letters as at the date when the request for review was heard. The procuring entity did not demonstrate any compelling reasons that caused it not to serve the letters at the same time as provided by law. The Board therefore holds that the PE did not comply with the provisions of section 87(1) and (3) of the Act."***

178. The Board then observed that failure by the Procuring entity to strictly comply with the said section 87 of the Act was not fatal unless such failure had occasioned prejudice to a bidder.

179. In this case, the applicant has demonstrated that it was highly prejudiced by failure to be served with the notification because it is that failure to serve the letter of notification in time that has caused the Review Board to decline jurisdiction to hear the applicant's request for review on merit and which this court finds and holds was made in error of law.

180. The above past decisions of the Review Board have made it clear that the 14 days appeal / review window starts to run when notification is received.

181. In this case, I have no doubt that the notification of award was received by the exparte applicant from the Post Office on 14th August 2017. The procuring entity has not told the court by what means it communicated the notification of award to the successful bidder and has therefore not countered the exparte applicant's depositions that the communication to the successful bidder was hand delivered and that Mr Patrick Mwangangi the head of procurement of the procuring entity admitted during the hearing of the request for review that the letter of notification was hand delivered to the successful bidder on 2nd August 2017.

182. Accordingly, I find and hold that the Review Board fell in error of law and acted unfairly when it computed time and found that time started running on 4th August 2017 when it posted the notification of regret letter to the exparte applicant.

183. Furthermore, the respondent and the interested party in all their submissions and contentions failed to appreciate the letter and spirit of the provisions of section 3(5) of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya which stipulates that:

> ***"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post."***

184. The exparte applicant had no issue with the postal address to which the letter of regret was sent. Neither did it have any issue with, when the letter was received, as it tendered evidence to show that the notification from the post office was received on 14th August 2017 and the letter was collected promptly on 15th August 2017. The only issue was with the computation of time with regard to when the time started running for purposes of filing of a challenge to the decision of the procuring entity.

185. In **Ali Yislam Hariz v Kenya Railways Corporation (2012) eKLR,** the court stated:

> ***"…Section 3(5) of the Interpretation and General Provisions Act makes certain provisions on service by Post-***
>
> ***"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post."***
>
> ***Service of the letter of 12th November 2010 would have been effected, unless the contrary is proved, at the time at which the letter would be delivered in the ordinary course of the Post. This Court was not told when actual delivery happened. But one thing is clear, the Managing Director had received the letter by at least 26th December 2010 when he wrote his response. If, however, there is a contest as when exactly that letter was delivered, then that can only be settled by receiving and considering evidence."***

186. In view of the above, I have no hesitation in finding that the Review Board's earlier decisions cited above represent the correct position and agree that on 14th August 2017 when the applicants' representative collected the notification from the Post Office is the date of notification hence 14 days according to section 57 of the Interpretation and General Provisions Act lapsed on 28th August 2017 and not on 18th August, 2017 by which time, in any event, the procuring entity and successful bidder had already entered into a contract on 17th August, 2017 without even publicizing the intention to enter into the said contract, and without seeking clearance from the Attorney General as required by law, as required by section 134(2) of the Act.

187. It must be emphasized that contracts that are pedigree of a flawed process must be rendered null and void ab initio. The right to file a Request against the decision of the Procuring Entity accrues after an unsuccessful bidder is notified that its bid was not successful, and with reasons.

188. The interested parties further focused their attention to the issue that in any event, the question of whether or not the Attorney General cleared contract in accordance with section 134(2) of the PPADA before it was signed was never raised as a ground for review before the Review Board and that therefore the same cannot be advanced. This is what the Review Board found when declining jurisdiction to entertain the request for review.

189. The view of this court is that a point of law or ground which hinges on an alleged illegality is not an issue of fact which would be considered to be an ambush requiring evidence to be gathered before a response can be made. Parties are expected to plead matters of fact and not law. The Review Board, like courts of law apply the law and therefore it is expected to know the law and therefore once a point of law is raised at any stage of the proceedings, the Courts or tribunals cannot give a blind eye to the issue.

190. The exparte applicant has explained that it learnt of the signing of the contract when it filed the request for review and replying

affidavits were filed by the interested parties and that is when it was compelled to write to the Attorney General to inquire on whether the clearance of the Attorney General was obtained prior to the signing of the said contract. And albeit the applicant did not amend its grounds before the review board to include the ground of illegality of the contract for non-adherence with section 134(2) of the Act, it was incumbent upon the review board to inquire into that aspect of an alleged illegality. There can be no estoppel against a statutory or constitutional provision and no contract however well drafted can vary or override statutory provisions.

191. The Court of Appeal in **Henry Muthee Kathurima v Commissioner Of Lands & another [2015] eKLR** held that:

> ***" estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there can be no estoppel against a statute. (See Tarmal Industries Ltd. – v- Commissioner of Customs & Excise, (1968) E.A. 471; see also Maritime Electric Co. Ltd. v General Dairies Ltd. (1937) 1 All ER 748)."***

192. In **Standard Chartered Bank of Kenya Limited v Intercom Services Limited & 4 others[2004]eKLR** cited in **Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited [2015] eKLR** the Court of Appeal in both cases made it clear that ***no court in this country can aid a party who is guilty of an illegality***. The Court also relied on the old case of **SCOT Vs. BROWN, DOERING McNAB & CO. [1892] 2 QB 724** where the English Court of Appeal held that an action founded on an illegal contract could not be maintained. And in **FESTUS OGADA Vs. HANS MOLLIN [2009] eKLR** the Court of Appeal took the position that ***even if the issue of illegality were to come to a court's attention by a side wind, the court must ensure it deals with it so as not to aid any flouters of the law to benefit from their illegal acts, which would be offensive to public policy.***

193. As aptly put by the Court of Appeal in the **Kenya Pipeline Company Limited v Glencore Energy** case[supra]:

> ***"In STANDARD CHARTERED BANK Vs. INTERCOM SERVICES LTD & 4 OTHERS (supra), this Court, differently constituted, accepted the submissions made that once an issue of a breach of a statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the Court must investigate it because the court's fundamental role is to uphold the law. The court upheld and endorsed the old English case of HOLMAN Vs. JOHNSON (1775-1802) All ER 98 where Chief Justice Mansfield stated;***
>
> ***"The principle of public policy is this:***
>
> ***Ex dolo malo no ovitur acti . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."***
>
> ***We respectfully agree with that pronouncement of the law that still speaks unmistakably more than two centuries later. What the English courts could not do to assist a lawbreaker, Kenyan courts and courts anywhere, should not do.***
>
> ***There is a consistent line of decisions of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succour and has refused to be an instrument of validation for such persons. We still refuse. See MISTRY AMAR SINGH Vs. KULUBYA [1963] EA 408, HEPTULA Vs. NOOR MOHAMMED [1984] KLR and FESTUS OGADA Vs. HANS MOLLIN (supra). In the last case the Court stated, and we are content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.***

194. What is espoused in the above cases is that once a court or tribunal's attention is brought to an issue of an illegality or breach of statute or constitutional provision, in the course of proceedings then in the interest of justice the court or tribunal must investigate it because the court's fundamental role is to uphold the law.

195. Therefore, that the exparte applicant never pleaded as a ground that section 134(2) of the Act was breached and therefore it could not be raised at the hearing of the request for review is discounted by the above decisions of the Court of Appeal and which decisions are binding on this court.

196. The interested parties also fiercely contested that the subject property dates back to 11/ July 2015 and that the new Act came into effect on 7th January 2016 hence the contract in issue was exempted from clearance by the Attorney General as per the correspondence exhibited. The view of this court is that indeed the 2015 PPADA came into effect on 7th January, 2016 and the procurement process for the subject property begun in January 2017 after the effective date of the 2015 Act. It follows that the subject contract having been signed after the effective date of the new Act which governs all public procurement processes, the procurement entity was bound to adhere to all procedures espoused under the new Act and in this case, therefore, the contract was not exempt from application of section 134(2) of the Act where the value exceeds 5 billion Kenya Shillings.

197. I add that the Attorney General's advisory is subject to the governing law which mandates that the accounting officer of the procuring entity shall ensure that all contracts of a value exceeding Kshs 5 billion are cleared by the Attorney General before they are signed and where an advisory does not conform to the law, the law, must override the advisory. Furthermore, this court has not been shown any letter from the Attorney General specifically exempting this specific procurement process and contract in issue from application of section 134(2) of the Act.

198. The letter dated 31st October, 2017 written by the Hon Attorney General Hon Githu Muigai does not exempt the procuring entity from

application of section 134 of the Act to the subject contract. My reading of the letter reveals that at paragraph 3 the Hon AG states that he provided an earlier advisory on 26th October 2016 concerning the tender documents relating to the procurement of the Nairobi City County Transaction Advisors and that he had advised that the procurement of Transaction Advisors did not require clearance by the AG as stipulated in section 134 of the Act, not that he advised that this procurement process as a whole was exempted from application of the section on clearance by the Attorney General, in view of the contract sum exceeding Ksh 5 billion.

199. In **Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited, [2004] 2 eKLR 530** the Court of Appeal citing this decision in **Henry Muthee Kathurima v Commissioner Of Lands & another [2015] eKLR** it was held:

> ***"…a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others…. Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims…"***

200. In addition, even from the attached correspondence between the Governor of the procuring entity Hon Mike Mbuvi Sonko and the office of Attorney General, it is clear that the procuring entity was still seeking for clarification on the matter before completing the process.

201. The objectives of the public procurement law are:

> ***a. to maximize economy and efficiency;***
>
> ***b. to promote competition and ensure that competitors are treated fairly;***
>
> ***c. to promote the integrity and fairness of those procedures;***
>
> ***d. to increase transparency and accountability in those procedures;***
>
> ***e. to increase public confidence in those procedures; and***
>
> ***f. To facilitate the promotion of local industry and economic development.***

202. In my humble view, irregularities and the breaches complained of against the Review Board and the procuring entity impact on the outcome of the procurement process and undermine the guiding principles set out in section 3 of the PPAD Act, Articles 10 and 227 (1) of the Constitution on good governance, integrity, transparency and accountability.

203. Thus, the decision by the Review Board that it had no jurisdiction to hear and determine the request for review because the contract had already been signed between the interested parties hereto; and that the request for review was filed out of the 14 days was in my humble view, made in error of law because first, the review Board never established whether the said contract was entered into in accordance with section 135 of the Act and secondly, the 14 days stipulated under the Act had not lapsed when the said contract was entered into, whether one construes notification to have taken effect from 4th August 2017 or from 14th August 2017, since there was no material to demonstrate that the applicant had the option of challenging the procurement process in July 2017 based on the rumors that the award may have been made to the 2nd interested party in July 2017. Thirdly, that had the Review Board inquired into the illegalities cited above, it would not have declined jurisdiction. It would have proceeded to hear and determine the request for review on merits and it would further have considered the serious illegality of the contract having been signed without clearance by the Attorney General as stipulated by section 134(2) of the Act, whether that issue was one of the grounds for review or not.

204. This court holds the view that the prior notification and contract executed with the successful bidder before elapse of 14 days after receipt of notification denied the applicant an opportunity to challenge the award which, principally, is a constitutional right to fair administrative action under Article 47 of the Constitution on the right to fair administrative action. This is so, considering that the law anticipates simultaneous notification of the decision to award or not to award the tender to all those participants in the tendering process which was not adhered to by the procuring entity in this case. That failure, in my view, amounted to procedural impropriety and illegality and invites this court's jurisdiction not only under Article 47 of the Constitution, but under supervisory jurisdiction under Article 165(6) and (7) of the Constitution to call into this court the proceedings of not only the Review Board but also of the procuring entity for purposes of making any order or giving any direction the court considers appropriate to ensure the fair administration of justice.

205. The court was also alerted that there was no publicizing of the intention to enter into the joint venture contract as awarded in the procuring entity's website as stipulated in the Act. Albeit the non-publication may not necessarily have been prejudicial to the applicant as it is meant to inform the public for transparency and accountability, it goes forth to demonstrate that the procuring entity was not keen on following the law in its dealings with the second interested party successful bidder. In my view, the guidelines provided by the Attorney General on the clearance of contracts are essential though not law in themselves and therefore had the procuring entity followed those guidelines, it would not have fallen in the situation of illegality and impropriety that it finds itself in.

206. What clearly emerges here and what is not controverted as asserted by the exparte applicant is that the successful bidder was notified of the award much earlier and knew of the outcome of the evaluation process by 2nd August 2017 whereas the exparte applicant was notified by post and received the notification nearly two weeks by which time the interested parties were already in the process of concluding the contract because they have even avoided disclosing to court the date when the 2nd interested party accepted the award as stipulated in section 87(2) of the Act which provides that ***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

207. In the humble view of this court, the procuring entity acted clandestinely and unfairly and with intent to lock out the applicant herein from seeking remedies as an unsuccessful bidder.

208. The exparte applicant further raised an important question on he validity of the tender process and asserted that the evaluation of the tender process was flawed to the extent that the procuring entity did not comply with the provisions of the Act that the process be completed within 21 days of the date of opening of the bids. The procuring entity however contended that the tender was evaluated in accordance with the tender documents. That may be so. However, as the tender documents are expected to adhere to the provisions of the Act, where there is a conflict between the tender documents and the Act on the evaluation completion period, it is the provisions of the Act that prevails or supersedes the tender documents, as the procuring entity has no discretion to bend the law.

209. The exparte applicant claims that after submission of the tender documents within the stipulated period, it never heard from the procuring entity until 14th August 2017 when it received a notification from the Post Office to collect a parcel and on 15th August 2017 it collected a letter of regret from the procuring entity. Further, that the evaluation process was therefore not completed in 21 days contrary to section 126(3) of the PPADA.

210. On the other hand, the opposing parties content that there was no requirement that the evaluation of the tender be completed in 21 days and that in any event, the evaluation was conducted in accordance with the tender documents which provided for 90 days.

211. The exparte applicant relied on the provisions of Section 126 of the PPADA which provides that:

> ***(1) An evaluation committee of a procuring entity shall examine the proposals received in accordance with the request for proposals.***
>
> ***(2) The procedures for evaluation of the request for proposal shall be by using each selection method set out in section 124 and as may be prescribed.***
>
> ***(3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement. [emphasis added].***
>
> ***(4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof.***
>
> ***(5) The notice of intention to enter into contract in subsection 87(2) shall, as applicable, be publicised on the procuring entity's website and other public notice boards that do not attract a cost***.[emphasis added.]

212. The procuring entity does not contest the allegations by the applicant and neither does it dispute the law as it is, applicable in evaluation of bids save that it contends that it completed the process and notified all participating bidders vide its letter dated 2nd August 2017 and that clause 3.11.1 of the tender documents stipulate that the bid shall remain open for acceptance for a period of 90 days from the date of bid opening or from the extended date of bid opening.

213. It is no doubt that the opening of the bids was carried out on 21st April, 2017 and notification to bidders letter was written by the procuring entity 2nd of August 2017 which was within 102 days, which was far way beyond the 21 days contemplated in the section cited above, and also beyond the 90 days stipulated in clause 3.11.1 of the tender documents. There is nothing to show that the extra 12 days were extended to the bid after elapse of 90 days stipulated in the clause above, noting that there is a difference between tender validity period and the completion of evaluation period.

214. The bids having been opened in the presence of all bidders or their respective representatives on 21st April 2017, therefore the 21st day fell on 13th May, 2017. Section 126(3) of the PPAD Act reproduced above is clear ***that the evaluation process must be completed within a maximum of 21 days but that shorter periods may be prescribed in the Regulations for particular types of procurement. The section does not provide for completion of evaluation of tenders beyond 21 days***.

215. There is no evidence that the evaluation process of the tender subject of these proceedings was completed within 21 days as stipulated in the section above.

216. Section 80 (2) of the PPAD Act provides that

> ***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender document."***

217. However, the above section must be read together with section 126(4) of the Act which stipulates that (***4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof,*** and other provisions of the Act and not in isolation thereof. The said section 80 in my view does not contradict section 126 (4) of the Act and therefore it is expected that any criteria developed in the tender documents must accord with the provisions of the Act and not at variance with the Act.

218. Accordingly, I have no hesitation in finding and holding that the tender process became invalid for failure to complete the evaluation process within 21 days from the date of tender opening.

219. The other question that must be answered is the relevance of the letter written by Mr Tom Odede of the Office of the Attorney General dated 21st September, 2017 on a ***"without prejudice"*** basis, on whether the contract between the 1st interested party and the 2nd interested party is null and void ab initio for lack of the Attorney General's clearance.

220. Albeit the interested parties claim that the Attorney General's office wrote a letter 21st September, 2017 on a **without prejudice** basis and contended that the letter could therefore not be relied on in evidence between the parties, it should be appreciated that the Attorney General did not write any letter exempting the particular contract from his approval. And even if he did, the contract would only be valid if it was entered into in accordance with the law, not when the contract was entered into hurriedly before elapse of 14 days from date of notification of the bidders of the outcome of the evaluation of their bids.

221. "**Without prejudice**" is a term which when used to circumvent the law cannot be accepted. In **Al Yusra Restaurant Limited v Kenya Conference of Catholic Bishops & Another (2014) eKLR**, it was held, with regard to the concept of ***"without prejudice***" communication thus:

> ***"The Courts have also on several occasions determined questions dealing with admissibility of 'without prejudice' documents. The following cases are indicative of the law on the subject;***
>
> ***(a) In the case of Millicent Wambui vs Nairobi Botanica Gardening ltd Cause No 2512 of 2012 the Court stated thus;***
>
> ***"…The Application revolves around "without prejudice" communication. The use of the term 'without prejudice' is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit. The words "without prejudice" impose upon the communication an exclusion of use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a 'without prejudice' offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues. For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties…"***
>
> ***(b) In Re Daintrey ex Holt [1893] 2 QB 116, the Court, per Vaughan Williams J, stated at page 119 that;***
>
> ***"In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which the rule applies, exist. The rule is a rule adopted to enable disputants <u>without prejudice</u> to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer, the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character."***
>
> ***(c) In Kawamambanjo Ltd vs Chase Bank and Another Civil Case No 344 of 2013 the Court held that;***
>
> ***"…The above notwithstanding, in Halsbury's Laws of England Vol 17 paragraph 213, it had been stated that:- "the contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible… Similarly as was held in the case of Lochab Transport Ltd vs Kenya Arab Orient Insurance Ltd [1986] eKLR:- "… if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of that "without prejudice" letter". As has therefore been seen hereinabove, contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties and that once a contract is concluded; one can give evidence of the terms of that "without prejudice" letter…"***
>
> ***(d) In the case of D. Light Design Incorporated vs Powerpoint Systems East Africa ltd Civil Case No 93 of 2013 the Court stated thus;***
>
> ***"…As was correctly submitted by the Plaintiff's counsel, negotiations that are done out of court must be guarded jealously to allow parties to be free to explore all possibilities of an out of court settlement with a view to compromising a suit. However, there was nothing to jealously guard in this matter as regards the correspondence that was attached in the Joint Affidavit. The Plaintiff does not even tell this court how the letters and credit notes by the Defendant to its clients were privileged. This is because as was also correctly stated out by counsel for the Defendant, the documents in the said Joint Affidavit were not privileged for the reason that the Plaintiff and the Defendant did not intend them to be confidential. This was illustrated by the fact that the letter marked "without prejudice" basis was to be acted upon and it was copied to other persons other than to the advocates of both the Plaintiff and the Defendant. Indeed, from the contents therein, the terms therein were acted upon. It is evident that the said documents were not intended to compromise the suit herein and they were acted upon before the suit herein was contemplated… In an adversarial system like the one in this jurisdiction, each party puts its best foot forward. It must be given a fair and***

reasonable opportunity to present its case in the best way it knows how. The right to fair trial in indeed envisaged in Article 50 of the Constitution of Kenya, 2010. It would be a travesty and miscarriage of justice if a party to a suit could dictate the evidence that its opponent would seek to be relying on. The inadmissibility of the evidence can only be as provided for under Section 23 (1) of the Evidence Act Cap 80 (laws of Kenya)."

I agree with the exposition of the law above and it is obvious that contrary to the assertions by the Applicant, "without prejudice" communication is not inadmissible in all instances. Whereas in commercial and other such disputes, the place of "without prejudice" communication is largely protected, I take the view that Re Daintrex (supra) is a good expression of the law where constitutional violations are claimed. A judge must have all material placed before him to make a fair and just decision in the circumstances. In the present case, if there is communication pointing to evidence of alleged violation of the Bill of Rights, the rule of inadmissibility must be made flexible to avoid further injustice being committed."

222. Iam in agreement with the above decision and the exparte applicant's submission that the letter dated 21st September 2017 from the Attorney General was not written in the context of negotiations aimed at settling any dispute out of court, and neither could the Attorney General negotiate with a public entity like the 1st interested party on whether or not to follow the public procurement law.

223. Clarification by the Attorney General on the law cannot be subject of without prejudice communication as that would defeat the objects and purpose of that public and state office which by its very mandate under Article 156 (6) of the Constitution is ***to promote, protect and uphold the rule of law and defend the public interest***.

224. *Without prejudice* communication from a public state office which is not made in litigation or pre litigation proceedings for purposes of negotiating a settlement of the claim out of court is a violation of one's right to information which is at the core of the exercise and enjoyment of all other rights by citizens. There are certain rights which cannot be enjoyed if information is denied or given on a without prejudice basis by public or state officers.

225. In this case, it is the right to a fair hearing under Article 50 which may not be fully enjoyed by the unsuccessful bidder unless information held by the Procuring Entity and Attorney General being the protector of public interest is availed to them.

226. In my view, therefore, the information sought from the Attorney General was for protection of the applicant's right to a fair administrative action and fair hearing as stipulated in Articles 47 and 50 of the Constitution of Kenya, 2010 and the promotion of the stipulation in Article 227(1) of the Constitution that the system to be used in public procurements should be fair, equitable, transparent, competitive and cost effective. It was also meant to protect the public interest.

227. Considering the manner in which the notification was selectively made to the successful and the unsuccessful bidder, I have no doubt in my mind that the procuring entity clandestinely and deliberately designed to block the applicant from seeking remedies under section 167 of the Act, in total disregard of section 176(1) (k) which proscribes knowingly withholding of a notification to unsuccessful tenderer; (l) signing of a contract contrary to the requirements of the Act or Regulations made thereunder. The act of sending notifications by different means to the successful and unsuccessful bidder in that while admitting that it notified the applicant by post, it is not willing to show by way of evidence, that the 2nd interested party successful bidder was also notified by the same means.

228. Therefore, the letter signed by Mr Tom Odede cannot qualify to be under the without prejudice principle. It clear that the procuring entity had informed the Attorney General's Office discovered that the contract in issue had not been executed in accordance with its internal administrative procedures and the law and that its legal department was still reviewing it. There was also revelation that the PE had admitted not submitting the contract to the Attorney General for clearance as required by law and that the Procuring entity had advised the successful bidder to await for official communication as to the conclusion of the matters.

229. Furthermore, the requirement for approval of the Attorney General is a legal requirement which is couched in mandatory terms that:

"134. (1) The accounting officer shall be responsible for preparation of contracts in line with the award decision.

(2) An accounting officer of a procuring entity <u>shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed.</u>

230. The above section does not segregate whether the contracts involve funds being paid from the Consolidated Fund or from the donor or elsewhere. In this case, however, where it is clear that the tender involved a joint venture with County Government of Nairobi City County meant that public resources would be incurred in the performance of the contract whether before or after the intended construction of the housing estates and therefore a public entity, unless exempted by law, cannot be given a free cheque to hand out contracts involving over Kshs 19 billion without involving the Attorney General who is the principal legal advisor to the Government to provide an appropriate advisory.

231. Moreover, the subject contract as annexed shows that there are conditions or obligations on the part of the procuring entity which have huge financial implications for example, payment of relocation fee for the relocation of any legal occupants/tenants on the subject property to be developed; payment of legal fees and costs and surrender of the land/subdivision thereof before development; project development fees, project soft costs and payment by the County Government to the development partner as a result of the termination of the contract where the County Government fails to fulfill any of its obligations or the County Government fails to make payments to the development partner in accordance with the Agreement. All the payments in anticipation are no doubt public funds and therefore it is inconceivable that a public entity would attempt to breach the law in favour of anarchy.

232. It is for the above reasons that I find and hold that the afore-mentioned breaches by the 1st interested party are contrary to the guiding

principles as set out in section 3 of the Act, and in particular, that the procuring entity be guided by the national values and principles under Article 10 of the Constitution of Kenya, 2010, especially, the principles of good governance, integrity, transparency and accountability as espoused under Articles 10 and 227 (1) of the Constitution.

233. In my humble view, the 1st Interested Party/ procuring entity's general conduct of the procurement process was tainted with opaqueness, lack of transparency, integrity, accountability was in blatant breach of the provisions of the PPAD Act. The process was not in consonance with the Constitutional values and principles espoused in in Article 10 and 227(1). It cannot, therefore, be said that the contract entered into between the procuring entity and the 2nd interested party was valid and enforceable or that it was devoid of any illegalities.

234. The exparte applicant further complained that ***the notification did not provide the reasons why the exparte applicant was an unsuccessful tenderer, contrary to the law***. I have perused the letter of notification of regret. The letter simply states that the tenderer was not successful for **incompleteness and for being nonresponsive**. It does not state what was incomplete and or what aspect of the bid was non responsive leading to the rejection.

235. Notification of regret to the unsuccessful tenderer and the giving reasons for the regret is not optional for the procuring entity. It is a mandatory requirement under Section 87(3) of the Act which stipulates:

> ***"Notification of intention to enter into a contract.***
>
> ***87. (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***
>
> ***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
>
> ***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***
>
> ***(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."***

236. Section 126(4) of the Act which complements the above provision states that ***"(4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof."***

237. It is the reasons in the notification that would enable a party to frame its grounds in the request for review. In this case, no disclosure as to what entailed non responsiveness or what was incomplete to enable the exparte applicant appreciate the rejection of its bid. It was not until the applicant filed a request for review proceedings that the exparte applicant heard from the interested parties as to what was wrong with the exparte applicant's bid and the detailed reasons why the exparte applicant's bid was rejected while the procuring entity remained mum over it for all that time. The Act mandates that reasons for the bids not being successful must be given. Failure to give reasons is therefore a breach of the Act as well as breach of the Fair Administrative Action Act, 2015 section 4 thereof which mandates that an administrator must give reasons for the administrative action or failure to take action. Public procurement processes are expected to be open, accountable, and intended to instill public confidence in the public procurement and disposal of public Assets.

238. In **Roche Diagnostics Ltd vs Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 TCC ALL ER 133 April, [2013] PTSR D.35, cited in Republic vs Public Private Partnerships Petition Committee (The Petition Committee) & 3 Others Exparte APM Terminals [2015] eKLR,** Coulson J laid down some broad principles applicable to requests for early specific disclosures in procurement proceedings which principles also apply to situations of notification to unsuccessful bidders and reasons and stated, inter alia; (material to this case):

> ***a) " An unsuccessful tender who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process activity carried out, so that an informed view can be taken of its fairness and legality.***
>
> ***b) That this should be the general approach is confirmed by the short time limits imposed by the Regulations on those who wish to challenge the award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in Mears Ltd vs Leeds City Council[2011] EWHC 40 [QB] " The requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings .***

239. Thus, failure to provide reasons for the decision raises significant question marks as to the transparency and clarity of the procurement process and exercise and gives rise to a whole host of questions. The tenderers may not be certain that there has been a fair and transparent process of the documentation.

240. In addition, a losing bidder may not adequately advance their case without detailed reasons for non-responsiveness and or incompleteness of their bids and it is not enough that the reasons are only disclosed during the hearing of the review. Giving reasons for

rejecting the bidder assures participants that the tender process was above board.

241. For all the above reasons, I find and hold that the exparte applicant's notice of motion has merit and must be allowed. The same is hereby allowed in the following terms:

> ***1. Certiorari be and is hereby issued removing into the High Court and I hereby quash the decision of the Public Procurement Administrative Review Board dated 11th September 2017 made in Application No. 78 of 2017.***
>
> ***2. I invoke Article 165(6) and (7) of the Constitution and call into this court the entire procurement process which were irregularly conducted by the procuring entity and issue Certiorari removing into the High Court and I hereby quash the proceedings leading to the decision of the Nairobi City County dated 2nd August 2017 to award Tender No. NCC/UR&H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership to Ederman Property Limited.***
>
> ***3. I hereby direct and order the Nairobi City County the procuring entity herein to commence a fresh procurement process with respect to Tender No. NCC/UR&H/T/514/2016-2017 for Request for Proposal (RFP) for the Urban Renewal and Redevelopment of Phase 2 – Ngong' Road Estate through Joint Venture Partnership, which procurement process shall accord with the established law and procedures.***
>
> ***4. In accordance with section 175(7) of the Act, having quashed the decision of the Review Board, i hereby order that each party shall bear their own costs of these judicial review proceedings.***

Dated signed and delivered in open court at Nairobi this 2nd day of February, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Mbaluto advocate for the exparte applicant

Miss Daido advocate h/b for Mr Bita for the Respondent

Miss Njeri Mucheru advocate for the 2nd Interested Party

N/A for the 1st interested party

CA: Kombo