



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 6 OF 2018

CONSOLIDATED WITH

MISC CIVIL APPLICATION NOS. 7 & 18 OF 2018

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

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND
ASSET DISPOSAL ACT, NO 33 OF 2015 LAWS OF KENYA**

AND

**IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE
REVIEW BOARD APPLICATION NO. 108 OF 2017**

REPUBLIC.....APPLICANT

VERSUS

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

**DE LA RUE CURRENCY &
SECURITY PRINT LIMITED.....1ST INTERESTED PARTY**

DE LA RUE KENYA EPZ LIMITED.....2ND INTERESTED PARTY

EX PARTE

CENTRAL BANK OF KENYA.....1ST EX PARTE APPLICANT

DE LA RUE INTERNATIONAL LTD..2ND EX PARTE APPLICANT

CRANE AB.....3RD EX PARTE APPLICANT

JUDGEMENT

Introduction

1. Article 231(4) of the Constitution of Kenya, 2010 provides as hereunder:

Notes and coins issued by the Central Bank of Kenya may bear images that depict or symbolise Kenya or an aspect of Kenya but shall not bear the portrait of any individual.

2. It is not in doubt that the currency being issued by the Central Bank of Kenya which is by virtue of Article 231(2) of the said Constitution responsible for formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred on it by an Act of Parliament, has been issuing currency bearing the portraits of the former heads of states.

3. Therefore in order to comply with the provisions of the Constitution the 1st applicant herein, the **Central Bank of Kenya** (hereinafter referred to as "the CBK") embarked on the procurement process for the tendering geared towards the printing of the currency that would comply with the said provisions of the Constitution. That process however met obstacles in the manner in which it was being conducted and led to a request for review before the Respondent herein, the **Public Procurement Administrative Review Board** (hereinafter referred to as "the Board").

4. In its decision made on 8th January, 2018, the Respondent issued the following orders:

1. A declaration be and is hereby issued declaring that the 2nd Respondent herein De La Rue International Limited was unlawfully awarded the Tender No. CBK/37/2017-2018 for the printing and supply of the new design Kenya currency and Bank notes and that the Application of a 15% preference margin in its favour was unlawful and that the award of the said tender to the 2nd Respondent as contained in the 1st Respondent's letter of notification award dated 30th November, 2017 be and is hereby annulled.

2. The 1st Respondent is directed to undertake a fresh evaluation of all the tenders submitted to it by all the four bidders who participated in the tender process herein and complete the said process within a period of fourteen (14) days from the date of this decision and in doing so, the Procuring Entity shall take into account the Board's observations on the issue of preference together with the provisions of Section 82 and 86(1)(a) of the Public Procurement and Asset disposal Act and any award made shall be made in strict compliance with the award criteria set out under Clause 2.27.4 of the tender document.

3. Any party aggrieved by any decision that the Procuring Entity will arrive at the conclusion of the fresh evaluation process shall be at liberty to seek any such remedy as it deems fit from the Board.

4. Owing to the nature of the orders made above, the Board directs that each party shall bear its own cost of this Request for Review.

5. It is the aforementioned decision of the Board that provoked the proceedings the subject of this judgement.

6. Subsequent to the delivery of the said decision, three judicial review applications were filed being JR Nos. 6, 7 and 18 all of 2018 by the CBK, **De La Rue International Limited** (hereinafter referred to as "De La Rue") and Crane AB respectively. These applications were in due course consolidated under petition no. 6 of 2018.

7. It is important to mention herein that there is a related petition being Petition No. 597 of 2017 between **Okiya Omtatah Okiiti vs. Central Bank of Kenya and Others** which was filed before the Respondent herein made its impugned decision. That petition was heard together with these proceedings though the same was not consolidated with the applications the subject of this judgement.

1st Applicant's Case

8. According to CBK, section 22 of the CBK Act mandates the CBK to have the sole right to issue banknotes in Kenya in addition to determining the denominations, inscriptions, forms, material and other characteristics of the banknotes. Accordingly, the CBK undertook the procurement of the new design currency in accordance with the Constitution of Kenya, **Public Procurement and Asset Disposal Act, 2015** and other applicable laws of Kenya and the award of tender was made to De La Rue International Limited, the 2nd ex parte applicant herein on November 30, 2017 after successful completion of the procurement process for Tender Number CBK/37/2017-2018.

9. It was CBK's position that the entire process was fair, equitable, transparent, competitive and cost effective in accordance with Article 227 (1) of the Constitution of Kenya. The CBK therefore denied all the allegations of wrongful application of the law in the aforesaid process as alleged in the decision under review or at all. It was averred that in pursuance of the Constitutional imperatives laid in Article 231(4) the procurement process of new design currency banknotes commenced in 2014 following an advertisement by the CBK for Prequalification of Suppliers for Production of Banknote Origination Material and Currency Printing Services. This was done both locally and internationally in Tender number CBK/043/2013/2014, published in two local dailies, a regional weekly paper and in the CBK's website. Following the prequalification process in Tender Number CBK/043/2013/2014, four firms were prequalified by CBK namely;

a. Giesecke & Devrient GmbH

Prinzregentenstrasse 159

P.O Box 800729

81607 Munich

Germany

b. Crane Currency

One Beacon Street

Boston

MA 021018

USA

c. De La Rue International

Jays Close Viabes

Basingstoke, Hampshire

RG22 4bs

United Kingdom

d. Oberthur Fiduciaire

Avenue De Messine- CS

30003

75383 Paris Cedex 08

France

10. It was averred that the 3rd ex parte applicant herein, **Crane AB**, was not one of the prequalified bidders. At the time of prequalification of bidders in the year 2014, the bidders were required to fill in a confidential questionnaire and provide information including particulars of each bidder and pursuant thereto **Crane Currency** furnished the questionnaire. It was however reiterated that in the said application the Applicant to be prequalified was **Crane Currency** and it indicated that it was not a consortium nor involved in a joint venture.

11. According to CBK, On October 24, 2017, CIT issued a Restricted Tender Referenced CBK 37/2017-2018 for Printing and Supply of New Design Currency. The tender was issued to prequalified Tenderers as set out in the terms of Tender Number CBK/043/2013-2014, where only candidates prequalified under the prequalification process pursuant to Regulations 23, 24 and 25 as read with Regulation 54(2) of the **Public Procurement and Disposal Regulations 2006** were to be considered for invitation to tender for either Production of Banknote Origination Material and or Printing and Supply of Banknotes. Following the prequalification, CBK first proceeded with a tender for origination material and dataset files for the new Kenya Currency and Bank notes by Tender No. CBK/ 64/2016-2017 and upon award of the tender it proceeded to issue a tender for the production and supply of the new design Kenya Currency and bank notes by Tender No. CBK/37/2017-2018.

12. It was averred that the restricted tender was issued to **Crane Currency, Giesecke and Devrient Gmbh, De La Rue International** and **Oberthur Fiduciaire**, having been prequalified as stated above. CBK emphasised that the correspondence by CBK during the origination stage (Tender No. CBK/ 64/2016-2017) as well as production and supply (Tender No. CBK / 37/2017-2018) was with Crane Currency being the prequalified bidder and not **Crane AB**, the 3rd Applicant herein (hereinafter referred to as "**Crane AB**"). Accordingly, CBK received tenders from the four prequalified bidders namely **Giesecke and Devrient, Crane Currency, De La Rue International Limited** and **Oberthur Fiduciaire** and in particular, **Crane Currency** when submitting its tender acknowledged receipt of the tender documents addressed to it on 24th October 2017.

13. Thereafter, the tenders were evaluated and on 30th November 2017 CBK issued a notification letter to **Crane Currency** informing them that their bid was not successful and that the tender was awarded to **De La Rue International Limited**, the 2nd Applicant, a notification whose receipt **Crane Currency**, by a letter dated 1st December, 2017, acknowledged and sought clarification and reasons for award of the tender to the said successful bidder. CBK responded and gave the reasons by its letter dated 5th December 2017. To that, **Crane Currency** responded by an email of 7th December 2017 as well as letter dated 13th December 2017.

14. It was averred that the 3rd Applicant herein, **Crane AB**, on 19th December 2017 filed a request for review before the Respondent being Public Procurement Administrative Review Board Case No. 108 of 2017 - **Crane AB vs. Central Bank of Kenya, De La Rue**

International Limited, De La Rue Currency & Security Print Limited and De La Rue Kenya EPZ Limited challenging the decision by CBK to award the Tender to the 2nd Applicant which Request was opposed by the 1st Applicant. On 8th January 2018, the Respondent rendered its decision and allowed the application for request for review in which the Respondent declared that CBK unlawfully awarded the successful bidder, the 2nd Applicant herein, Tender No. CBK/ 37/ 2017-2018 for the print and supply of the new design Kenya Currency and bank notes and that the application of a 15% preference margin in favour of the successful bidder was unlawful. Accordingly, the decision of CBK as contained in the letter of notification dated 30th November 2017 was annulled by the Respondent. The Respondent further directed CBK to undertake a fresh evaluation of all the tenders submitted to it by all the four bidders who participated in the tender process and complete the process within 14 days of its decision.

15. It was contended that the Respondent is a public body established under the provisions of the **Public Procurement and Disposal and Asset Disposal Act of 2015** with the mandate to review public procurement and asset disposal proceedings. Based on legal advice, the 1st Applicant, CBK, believed that the said decision of 8th January 2018 by the Respondent is ultra vires the law. It was further contended that the Respondent in rendering the said judgment acted irrationally by failing to consider the mandatory terms of the **Public Procurement and Asset Disposal Act** as well as the Tender documents.

16. It was averred that CBK filed a Preliminary Objection to the request for review on the Jurisdiction of the Respondent to hear the application for request for review as the same was filed out of time and as the 1st Interested Party was not a bidder or tenderer having not been prequalified. However, the Respondent in total disregard of the express statutory provisions allowed the Request for review by a third party entity who was not a tenderer or a candidate and further ignored that the same had been filed out of time contrary to the mandatory statutory period and in turn acted in excess of its jurisdiction and in breach of section 167(1) of the **Public Procurement and Asset Disposal Act 2015**. According to CBK, based on legal advice, the Respondent by its decision of 8th January 2018 directed CBK to re-evaluate all tenders including by **Crane AB** which entity was not prequalified in breach of section 95(3) of the **Public Procurement and Asset Disposal Act**.

17. To CBK, the said conduct of the Respondent of acting contrary to the provisions of section 95(3) of the **Public Procurement and Asset Disposal Act** is illegal, ultra vires and in excess of the Respondent's jurisdiction and ought to be quashed by this Court since the Respondent has no powers to disregard express provisions of statute as it did in rendering its decision of 8th January 2018. It was the CBK's case that the Respondent disregarded mandatory provisions of the **Public Procurement and Asset Disposal Act, 2015** as it did by its Judgment of 8th January 2018 and the said decision amounts to a fundamental misdirection and/ or failure to address the applicable law thereby rendering the said process and decision devoid of legality and therefore void. Further, the Respondent by disregarding the mandatory provisions of the **Public Procurement and Asset Disposal Act, 2015** that expressly mandates the CBK to comply with the provisions of the Constitution as well as PPADA, 2015 on preference margin and directing the CBK to re-evaluate the tenders submitted in breach of the law, is an act without jurisdiction and contrary to the **Public Procurement and Asset Disposal Act 2015**.

18. It was CBK's case that the said unfair, illegal and unreasonable conduct by the Respondent affected its decision of 8th January 2018.

19. In response to **Crane AB**'s application, CBK reiterated the foregoing and averred that the allegation that the Board erred in issuing an Order for fresh evaluation instead of awarding the tender to the Applicant is impractical as **Crane AB** had, in the request for review prayed for fresh evaluation of the tenders but not for the Respondent to direct that the tender be awarded to it. It was averred that **Crane AB** having failed in the request for review to ask for an Order for the tender in question to be awarded to them, it cannot now seek an Order for mandamus and therefore the Application for mandamus ought to be dismissed as it is not true that the Respondent acted unreasonably by failing to award the tender in question to the Applicant.

20. According to CBK, **Crane AB** did not have the lowest evaluated tender and is not entitled to the award of the tender as alleged or at all and the tender was properly awarded to De La Rue International Limited. Based on legal advice, CBK believed that in the absence of a prayer in the request for review for an order awarding Tender No CBK/ 37/2017-2018 to **Crane AB**, it cannot be stated that the Respondent to this extent acted unfairly or unreasonably or that it disregarded the provisions of section 173 of the **Public Procurement and Asset Disposal Act** and or that it failed to discharge its duties as provided by statute and or abused its discretion as alleged or at all. The CBK asserted that the allegation that CBK is not willing to be governed by fair provisions of the law and tendering documents is not true and is made without any basis. Similarly, the allegation of unfairness was denied.

21. CBK's position was that the Applicant had not demonstrated breach of any of its fundamental rights guaranteed by the Constitution and or how they would be prejudiced if the orders for *mandamus* were not granted. Further, **Crane AB** had also not demonstrated how its legitimate expectations if any, which was denied, would be prejudiced if the orders of *mandamus* sought were not granted. It was reiterated that **Crane AB** was not prequalified as a bidder by CBK and is not therefore entitled to take part in the proceedings in question and cannot be awarded the Tender No CBK/ 37/2017-2018 hence the Court should not issue the same.

22. In CBK's view, 3rd Applicant was seeking to argue on merits reasons why the tender should be awarded to it while it had failed to prove that it has met the test for grant of *mandamus*.

23. It was submitted on behalf of the CBK that the Review Board is a statutory body established by section 27 of the **Public Procurement and Asset Disposal Act 2015** with the mandate to review procurement proceedings. According to CBK, the Review Board as a statutory body has no power to make orders that violate the **Public Procurement and Asset Disposal Act 2015** as it is a creature of such Act. Being a statutory body, the Board is mandated to exercise its powers within the confines of the law and cannot act outside it. It was however submitted that the Respondent acted contrary to the Law by failing to consider the mandatory terms of the **Public Procurement and Asset Disposal Act** as well as the tender documents in the following ways.

24. Allowing a party that was not a tenderer to file a request for review in breach of the provisions of Sections 95(3) and 167(1) of the Public Procurement and Asset Disposal Act. CBK submitted that section 167(1) provides that only a party that has taken part in a tender can file a request for review before the Respondent challenging the decision of a procuring entity to award the Tender. Therefore the Respondent acted

ultra vires and without jurisdiction by allowing Crane AB, **Crane AB** to file and proceed with the request for Review filed as Application 108 of 2017 while the said Crane AB was not prequalified in 2014.

25. It was submitted that tender No CBK/037/2017-2018 was restricted to prequalified bidders and it is not in contention that there were only four prequalified bidders; **Crane Currency, Giesecke and DevrientGmbh, De La Rue International** and **Oberthur Fiduciare**. In this case however, the Applicant herein is Crane AB which is a separate entity from Crane Currency and in support of this relies on the following documents:

- a. A copy of the Confidential Business Questionnaire in respect of Tender No CBK/043/2013/2014 for prequalification of suppliers for Production of Banknote Origination Material and Currency Printing Services. (**page 1-8**) of the annexures to 1st Respondent's Replying Affidavit.)
- b. Power of Attorney dated 25th June 2014.- see **page 9**.
- c. Application filed in 2014 at the time of prequalification is attached at page **1-8** of the attachments to the Verifying Affidavit.
- d. A copy of the application form for Tender No CBK/043/2013/2014 for prequalification of suppliers for Production of Banknote Origination Material and Currency Printing Services duly stamped acknowledged by CBK. (**page 10-12**).

26. According to CBK, the entity that is the tenderer in all these documents is **Crane Currency** which is also the one that applied for prequalification and was indeed prequalified. **Crane AB**, the 3rd Applicant herein, has never applied prequalification and was never prequalified.

27. It was submitted that following the prequalification of the 4 companies it issued a tender for Design of the new currency notes in March 2017 being Tender No. CBK/64/2016-2017. Correspondence between the 1st Applicant and Crane Currency is attached at page **13-16**. The entity bidding for this tender and which was prequalified was Crane Currency and not Crane AB as is evident from page 13 and 15 of the said documents. At page **22A** is a Power of Attorney dated 14th March 2017 by which Crane Currency appointed One **Angelo Kok** being a director of a subsidiary (Crane AB) to act on its behalf. The invitations to tender in respect of Tender No. CBK/037/2017-2018, the subject of these proceedings, were issued on 24th October 2017 to each of the 4 prequalified bidders as named above. The tender being a restricted tender was only issued to these 4 companies. Copies of the letters issuing the tender are attached at page **17-20**. None was issued to the 3rd Applicant Crane AB. See page **17**.

28. CBK emphasised that the entity that was pre-qualified and put in tenders for both design as well as printing and supply was Crane Currency and not Crane AB and the 3rd Applicant having admitted that the two are separate entities, **Crane AB** was not a tenderer within the meaning of section 167(1) of the **Public Procurement and Asset Disposal Act**. This is further evident from the letter dated 1st December 2017 (see **page 24**) in response to the notification of award in which the 3rd Applicant states "**on the opening of the tenders on 22nd November 2017 it was clear that CRANE CURRENCY had submitted the lowest bid**".

29. It was submitted that the issue of the locus of the 3rd Applicant to file the request for review was an issue before the Respondent in **Application No. 108 of 2017**.

30. According to CBK, the Respondent by its decision and finding that the 3rd Applicant was the tenderer acted *ultra vires* the law. In addition, the 3rd Applicant in making the said decision ignored the fact that this was a restricted tender and a tenderer within the meaning of Section 167(1) of the **Public Procurement and Asset Disposal Act** could only be by a party that had already been pre-qualified and as such acted without jurisdiction and *ultra vires* the law. The Respondent was therefore accused of having disregarded the provisions of section 95(3) of the **Public Procurement and Asset Disposal Act**.

31. Accordingly, CBK contended that the Respondent ignored the requirement for prequalification to be able to participate in the tender in question and the Respondent has no powers to ignore the express provisions of the tender. In light of the said *ultra vires* and illegal act of the Respondent, the Court was urged to quash the decision of the Respondent of 8th January 2018 as prayed in prayer 1 and 2 of the application.

32. It was further submitted that the Respondent acted contrary to the provisions of section 167(1) of the **Public Procurement and Asset Disposal Act** by allowing a Request for Review that was filed out of the statutory period of 14 days. According to CBK, the Respondent in its decision of 8th January 2018 held that the Request for Review dated and filed on 19th December 2018 was filed within the time provided under section 167(1) of the **Public Procurement and Asset Disposal Act** a finding which CBK contended was contrary to section 167(1) of the **Public Procurement and Asset Disposal Act**.

33. CBK submitted that the decision the subject of the request for review was made on 30th November 2017 and a letter of notification on the outcome of the tender was issued on the same date. A letter was issued on the same date to Crane Currency as a bidder informing it that it was not successful. A copy of the letter is attached at **page 23** and the forwarding email is at **page 23A** of the annexures to the Verifying Affidavit. The 3rd Applicant received the said letter and responded by an email of the same date (**page 23A**) and subsequently by a letter dated 1st December 2017 (**page 24**). By a letter dated 5th December 2017 (**page 25 -26**), the 1st Applicant responded to the 3rd Applicant's letter of 1st December 2017, and emailed by the 3rd Applicant to 1st Applicant on 5th December.

34. It was submitted that the decision to award the tender having been made on 30th November 2017 and the 1st Applicant having notified Crane Currency as a bidder on the same date, the application for review ought to have been filed on or before 14th December 2017. The 1st Applicant sent to the 3rd Applicant the letter dated 30th November 2017 by an email of the same date sent at 9.02 a.m. The 3rd Applicant on

receiving the same responded by an email sent on the same date at 11.24 am as well as formal letter on the following date 1st December 2017. Accordingly, the time for filing the request for review started running on 30th November 2017 when the 3rd Applicant received the letter of 30th November 2017 and email forwarding the same. In arriving at this decision, the Board held that the 1st Applicant had failed to comply with section 87(3) of the Act and as such it could not raise an objection on want of jurisdiction on account of the filing of the request for review outside the 14 days provided by the Act.

35. According to CBK, the email address it used to send the letter of notification is the same email address used in the email of 30th December 2017 from **Angelo Kok**, is also the same email address in the letters dated 1st and 5th December 2017 respectively and it cannot be said there was breach of section 87(3) and as such the time as set out in section 167(1) of the Act. With the clear evidence on the date and mode of notification on the award of the tender being 30th November 2017, the Respondent ignored all this and further acted *ultra vires* by failing to hold that the Request for Review was filed out of time.

36. It was submitted that the Respondent is bound by the provisions of the Act and can only exercise its jurisdiction as provided otherwise its actions will be *contra statute*, without jurisdiction and *ultra vires*. In support of this we rely on the holding of the Court in **Judicial Review Case No. 21 Of 2015 - Republic vs. Public Procurement Administrative Review Board & Centre for Mathematics, Science and Technology in Africa** in which the Court held that the Respondent has no jurisdiction to entertain a request for review filed after 14 days from the date of notification and that the jurisdiction of the Respondent in the event of such failure is extinguished completely.

37. It was submitted that the Respondent in determining the issue of whether the request for review was filed within the time prescribed by the Act overlooked the information provided by the 1st Applicant and while these are judicial review proceedings, this Court is entitled to review both facts and law and intervene as was stated in **Miscellaneous Application no 540 of 2008 Republic vs. Public Procurement Administrative Review Board and Kenya Revenue Authority**. The result of this is that the decision of the Respondent on this ground alone must be quashed in its entirety and the Court ought to grant prayers 1 and 2 of the substantive application by the 1st Applicant.

38. It was submitted that the Respondent by its decision of 8th January 2018 acted *ultra vires* the provisions of section 155 and 157 of the **Public Procurement and Asset Disposal Act 2015**. According to CBK, the Respondent in its decision of 8th January 2018 issued a declaration that the 2nd Applicant was unlawfully awarded tender no CBK/37/2017-2018 and that the application of the 15% margin in its favour was unlawful and nullified the award. It stated that for the successful bidder to qualify for application of the 15% preference margin **“need to demonstrate that it has capacity in its own right to manufacture, print, produce or assemble the bank notes in Kenya as a bidder”**. The Respondent further stated that the margin was wrongly applied as the 2nd Applicant was going to produce the currency locally using another company, the 2nd Interested Party.

39. However the CBK submitted that the Respondent in making the decision of 8th January 2018 on the 15% preference margin wrongly applied the law and interpreted the terms of the tender documents. The Respondent failed to appreciate that the 2nd Applicant had sought and obtained the authority of the 1st Applicant as the procuring entity to have the currency printed in Kenya and on the basis of the location of the printing was entitled to the said preference under the provisions of the Act. The Respondent further erroneously interpreted section 155 (3)(b) of the Act relates to the place of production or manufacture of the goods and which the 2nd Applicant had in its tender documents shown to be in Kenya. As a result, it was submitted that the Respondent as a result failed to appreciate and uphold the application of sections 155 and 157 of the Act and as a result acted *ultra vires* and the resultant declaration that the 1st Applicant illegally applied the margin of preference is null and void and ought to be quashed.

40. The Court was therefore urged to quash the decision of the Respondent of 8th January on this account based on the decision of the Court **Miscellaneous Application no 540 of 2008 - Republic Vs Public Procurement Administrative Review Board and Kenya Revenue Authority** in which the High Court quashed the decision of the procurement board following its misinterpretation of the statutory provisions on application of the margin of preference.

41. It was submitted that the foregoing indicates how the Respondent acted *ultra vires* the law and states that any such action is null and void and is to be quashed by this Court. In support of this the CBK relied on the holding of this Court in **Miscellaneous Civil Application No. 305 of 2017 - Republic vs. Chairman Political Parties Disputes Tribunal**, in which the Court cited **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** and held that a judicial or quasi tribunals such as the Respondent has no inherent powers and can only act within the powers expressly conferred on it by statute. In the above case upon the Court finding that the Respondent acted without jurisdiction held that such decisions by a tribunal that are without jurisdiction are *ultra vires* the law and therefore unlawful and tainted with illegality and null and void and granted an Order of certiorari quashing the same. Based on the said decision CBK asked the Court to find that the decision of the Respondent of 8th January 2018 was without jurisdiction, is an illegality and null and void and to quash the same and grant prayers 1 and 2 of the 1st Applicant's Application.

42. As regards the issue whether the Respondent in rendering the Judgment of 8th January 2018 acted illegally and irrationally by directing the 1st Applicant to re-evaluate the tender of all parties that put in tenders including the 3rd Applicant who was not prequalified and not entitled to participate in the tender in question and or file a request for review with the Respondent, CBK reiterated the above submissions that the decision of the Respondent of 8th January 2018 was illegal and irrational by entertaining a request for review by a party that was neither prequalified nor a tenderer and further requiring the 1st Applicant to undertake a fresh evaluation under the circumstances. It was further submitted that the decision was irrational as the Respondent in making the decision ignored express provisions of the law and the facts on record and we request the Court on this basis to quash the same.

43. As to whether the Respondent has powers to disregard express provisions of the law as well as the Restricted Tender documents while determining the said request for review filed by the 3rd Applicant, the CBK reiterated the submissions that the Respondent is bound by the law and its creating statute and does not have inherent jurisdiction and cannot disregard the express provisions of the law. It was CBK's case

that the Respondent acted contrary to several cited provisions of the **Public Procurement and Asset Disposal Act** and as such acted illegally. The Respondent in total disregard of the express statutory provisions allowed the Request for review by a third-party entity who was not a tenderer or a candidate and further ignored that the same had been filed out of time contrary to the mandatory statutory period and in turn acted in excess of its jurisdiction and in breach of section 167(1) and 95(3) of the **Public Procurement and Asset Disposal Act 2015**.

44. Further, the Respondent's disregard mandatory provisions of the **Public Procurement and Asset Disposal Act 2015** as it did by its Judgment of 8th January 2018 and the said decision amounts to a fundamental misdirection and/ or failure to address the applicable law thereby rendering the said process and decision devoid of legality and therefore void. In support of this CBK relied on a similar holding of the Court in **Miscellaneous Applic No 540 of 2008 - R vs. Public Procurement Administrative Review Board & Kenya Revenue Authority** in which the Court held that:

“A fundamental misdirection or failure to address the applicable law or a fundamental error of law in reaching a decision does render the decision reached by a decision maker devoid of legality and therefore void. By failing to respect clear statutory and mandatory provisions the Respondents were ultra vires both Section....”

45. According to CBK, the Respondent having acted illegally the decisions of 8th January 2018 pursuant to such illegal action cannot stand and it requested the Court to quash the same and grant the 1st Applicant prayers 1 and 2 of its application.

46. As regards the issue whether the 3rd Applicant was entitled to an Order of *mandamus*, CBK submitted in the negative for the reasons that the Third Applicant in its Request for Review dated 19th December 2017 did not seek for the Respondent to issue an order awarding the tender in question to it.

47. It was therefore submitted that the 3rd Applicant cannot now seek an Order of Mandamus for the tender in question to be awarded to it while in the Request for Review it did not seek such orders. The 1st Applicant states that the 3rd Applicant is seeking to introduce issues that were not before the 1st Respondent as a basis for grant of the orders of mandamus.

48. With respect to the allegation by the 3rd Applicant that it had a legitimate expectation that the Respondent in determining the request for review would issue an order awarding it the tender and that there has been breach of this legitimate expectation, it was submitted that the 3rd Applicant has failed to justify this legitimate expectation as well as breach of the same. To the CBK, even if there was breach of such legitimate expectation which is denied, the same is not a basis for grant of an Order of Mandamus and in support of this relied on the holding of the Court of Appeal decision in **Civil Appeal No. 44 of 2014 Makupa Transit Shade Limited and Another vs. Kenya Ports Authority and Others**.

49. CBK also relied on the **JR No of 2016 - Sosian Energy Limited vs. Public Procurement Administrative Review Board** in which the Court held that parties in a judicial review application against the Respondent can not seek to introduce new issues that were not previously raised in the request for review.

50. It was contended that since the Respondent in its decision of 8th January 2018 directed the 1st Applicant to undertake a fresh evaluation of the tenders received and the 3rd Respondent in its application dated 19th January 2018 has not sought to quash this directive/ order, the 3rd Applicant is not entitled to an Order for mandamus. In support of this submission the 1st Applicant relied on the holding of the Court of Appeal in **Civil Appeal No. 44 of 2014 - Makupa Transit Shade Limited and Another vs. Kenya Ports Authority and Others**.

51. In the alternative, it was submitted that the Respondent does not have powers under the 2015 Act to award a tender on a request for review. This is following an interpretation of section 173 of the **Public Procurement and Asset Disposal Act** in the case of **High Court Misc Application 302 of 2016 - R vs. Public Procurement Appeals Review Board ex parte Kenya Power and Lighting**.

52. The CBK submitted that the Respondent has no powers to substitute its decision with that of the 1st Applicant or its evaluation committee to award the tender and as such the Board could not have issued an order awarding the tender to the 3rd Applicant and as such an order for mandamus cannot issue.

53. It was further CBK's case that an Order of mandamus is a discretionary order and that the 3rd Applicant failed to show how it will be prejudiced if the orders of mandamus are not granted and in the absence of such evidence the Court ought not to exercise its discretion in its favour in granting the orders.

54. As regards costs, it was submitted that the 1st Applicant made out a case for grant of the Orders of Certiorari on the basis of the conduct of the Respondent and therefore requested for an Order for costs.

2nd Applicant's case

55. The 2nd Applicant, **De La Rue International Ltd**, on the other hand sought an order of *certiorari* to bring into this Honourable Court the Respondent's Decision dated 8th January 2018 in PPARB No 108 of 2018 between Crane AB and Central Bank of Kenya, De La Rue International Limited, De La Rue Currency & Security Print Limited and De La Rue Kenya EPZ Limited for the purpose of being quashed and/or annulled in its entirety. The 2nd Respondent also sought costs of the application.

56. According to the 2nd applicant, **De La Rue International Limited**, it is a private limited liability company incorporated in the United Kingdom under Registration Number 00720284 and is a wholly owned subsidiary of **De La Rue Holdings Limited**.

57. According to the 2nd Applicant, in the year 2014 the Applicant participated in and was a successful bidder in tender Number CBK/043/2013/2014 floated by the CBK for the prequalification of suppliers for production of banknote origination material and currency printing services (“the Prequalification Tender”). The other entities that were successfully prequalified in the Prequalification Tender were M/s **Giesecke & Devrient, Crane Currency** and **Oberthur Fiduciaire**.

58. It was averred that following the prequalification under the Prequalification Tender, on or about 24th October 2017 the 2nd Applicant was invited by the CBK to bid in Restricted Tender Number CBK/37/2017-2018 for the printing and supply of new design Kenya currency floated by the CBK (“the Restricted Tender”). The 2nd Applicant is aware that the other entities that had been prequalified under the Prequalification Tender i.e. **M/s Giesecke & Devrient, Crane Currency** and **Oberthur Fiduciaire** were also invited to bid in the Restricted Tender. According to the 2nd Applicant, both in the Prequalification Tender and the Restricted Tender, the 2nd Applicant made it known to the CBK that if successful in the Prequalification and the Restricted Tender respectively it (the 2nd Applicant) if would be performing the tender through its affiliate by way of subcontracting a portion of the tender performance to its affiliates in Kenya **M/s De La Rue Currency & Security Print Limited** and **De La Rue Kenya EPZ Limited**.

59. The 2nd Applicant averred that in preparing its bid and in view of the intention to part-perform the tender in Kenya through its Kenyan affiliates, the Applicant laid emphasis on its affiliation to the said Kenyan entities, the proposed subcontracting and the affiliates’ capacity to perform the tender in Kenya if the Applicant’s bid was successful and the subcontracting was approved by the CBK. It was from the outset the Applicant’s intention to make a case for local preference treatment of its bids under the Prequalification Tender and the Restricted Tender. It was disclosed that the Applicant expressed its intention to execute the Tender with its local entities.

60. It was averred that on or about 6th November 2017 prior to submission of its Tender, the 2nd Applicant wrote to CBK seeking certain clarifications on the Tender document and evaluation criteria which clarification was set forth in a letter dated 6th November 2017. Pursuant thereto, on 8th November 2017 the CBK issued Addendum Number 3 pursuant to clause 2.5.2 of the Tender Document providing clarifications on the queries. Further to that on 14th November 2017 the CBK issued Addendum Number 4 and further clarified the issue of Preference and Reservations.

61. The 2nd Applicant averred that on 22nd November 2017 it submitted its bid on 22nd November 2017 in compliance with the Tender Document and Addenda Number 3 and 4.

62. It was deposed that the bids were opened on 22nd November 2017 in the presence of all the bidders who had availed their representatives. Thereafter the CBK embarked on evaluation of the Tenders and on 30th November 2017 the CBK communicated to the Tenderers the outcome of the technical and financial evaluation following evaluation of the bids and informed the Parties that the tender had been awarded to the 2nd Applicant who had submitted the lowest evaluated price.

63. However on 19th December 2017 the 3rd Applicant, **Crane AB**, filed PPARB Number 108 of 2017 and a summary of **Crane AB’s** contentions and basis for Request for Review were as follows:

1) In issuing Addendum number 3 and in evaluating the Tender, the procuring Entity wrongfully applied the provisions of sections 155 and 157 of the **Public Procurement and Asset Disposal Act of 2015** (“the New Act”) to accord **De La Rue International** preference. The law that ought to have been applied was the Public **Procurement and Asset Disposal Act of 2005** (“the Repealed Act”).

2) The Application of 15% preference margin provided for under section 28 of the **Public Procurement and Asset Disposal Regulations, 2006** was invalid as the 2006 Regulations had expired by virtue of section 21(1) of the **Statutory Instruments Act, 2013**.

3) **De La Rue International Limited** was not entitled to use its Kenyan affiliates as basis for qualifying for preference since the affiliates were not prequalified.

4) The consent of the Procuring Entity was not obtained to allow **De La Rue International Limited** to subcontract the Tender to its Kenyan affiliates.

5) **De La Rue International Limited** does not meet the Preference requirements under the New Act as Kenyan citizens do not own at least 51% of its shares.

6) Inclusion of Addendum No 3 “midstream through the Tender process” to include preferences and reservation was intended to tilt the Tender in favour of **De la Rue International Limited**.

7) High Court Constitutional Petition Number 568 of 2017 - **De La Rue Currency & Security Print Limited and De La Rue Kenya EPZ Limited vs. Central Bank of Kenya** and its withdrawal “on the same day” that the Tender was awarded to **De La Rue International** was used to influence the award of the Tender to **De La Rue International Limited**.

8) Whereas the award of the Tender was to be two lots the entire Tender was awarded as though it constituted one Lot.

9) In awarding the Tender, there was no input nor approval of the Central Bank of Kenya Directors as required under section 10 of the Central bank Act.

64. In view of the above contentions **Crane AB** in its Request for Review sought the following orders:

- 1) A declaration that De La Rue International Limited was unlawfully awarded the tender after the irregular application of a 15% preference margin.**
- 2) A declaration that the Applicant, Crane AB submitted the lowest evaluated price.**
- 3) The Procuring Entity be ordered to transparently re-evaluate the Tenders of only the compliant Tenderers for purposes of the Award of this Tender.**
- 4) The Procuring Entity be ordered to pay the costs of this Administrative Review.**

65. According to the 2nd Applicant, it opposed the said Request for Review and filed the following documents:

- (i) A Notice of Preliminary Objection dated and filed on 27th December 2017; and
- (ii) A Memorandum of Response dated 27th December 2017 and filed on 28th December 2017
- (iii) List and Bundle of Authorities dated and filed on 29th December 2017
- (iv) Written submissions dated 2nd January 2018 and filed on 3rd January 2018

66. The 2nd Applicant's case as set forth the in the above documents filed was as follows:

- 1) The Review Board (Respondent herein) lacked jurisdiction in the matter as the Request for Review had been filed out of time.**
- 2) The Public Procurement and Asset Disposal Act, 2015 ("the New Act") and the 2006 Regulations was the correct law applicable to the subject Tender. In any event, the provisions regarding local preference under the Repealed Act and the New Act are similar.**
- 3) Throughout the tendering process, commencing with the Prequalification Tender in 2014, the tenderers were aware of the local preference criteria and subcontracting options. Addendum Number 3 was therefore not an introduction of a new evaluation criteria.**
- 4) De La Rue International Limited was entitled to and in its bid it had sufficiently demonstrated through evidence of local affiliation and capacity that it was entitled to local preference treatment under the Tender Documents, section 155 of the New Act and Regulation 28 of the 2006 Regulations.**

67. The Procuring Entity, the CBK herein, also opposed the Request for Review and filed a number of documents including Confidential Reports with the Board and during the hearing of the Request for Review made submissions whose effect was *inter alia* to show that:

1) Crane AB was not prequalified under the Prequalification Tender of 2014 and was not a candidate or Tenderer within the meaning of section 167(1) as read with section 2 of the New Act.

2) On 30th November 2017 it had notified all the Tenderers of the award and non-award of the Tender as the case may be through written notifications sent by emails to email addresses provided by the Tenderers.

3) It was bound and guided by the Tender Documents, Clarifications sought by Tenderers, the Constitution, Section 155 of the New Act and the 2006 Regulations in applying local preference an evaluation criteria in the Tender.

4) De La Rue International Limited had in its bid provided sufficient proof that it was entitled to the 15% margin of preference.

68. It was averred that the Request for Review hearing proceeded on 3rd January 2018 and the Respondent herein delivered its decision on 8th January 2018. On the face of the Board Decision it is apparent that:

1) The matter before the Board was a review against the decision of the Central Bank of Kenya which was communicated in its letter of notification dated 30th November, 2017 in the matter of Tender No. CBK/37/2017-2018 – (page 1 paragraph 1 of the Decision).

2) It was evident to the Board that the letter of notification to CRANE AB dated 30th November 2017 was the trigger for the Request for Review application -(page 58 paragraph 2 of the Decision).

3) The Board noted that De La Rue international Limited (Tenderer No 3) had the highest technical score – 98% which constituted printing capability, printing timelines, quality assurance, risk management, security, public education, solvency and liquidity – (page 6, paragraph 2 of the Decision)

4) The Board proceeded on the basis that the Applicant (4th Interested Party herein) had set out one broad ground for review- (page 11, paragraph 2 of the Decision)

5) The Board acknowledged the submission on behalf of the Procuring Entity – Central Bank that Crane AB was a stranger to the proceedings as it was not prequalified - (page 14, paragraphs 2 and 3 of the Decision)

6) The Board acknowledged the submission on behalf of the De La Rue International Limited that a Tenderer applying for a Request for Review under Section 167(1) of the Act needed to show that it had suffered loss and/or risked suffering loss or damage occasioned by an alleged breach of law by the Procuring Entity - (page 14, paragraphs 2 and 3 of the Decision)

7) In disallowing the Objection on grounds of locus standi the Board only considered the fact that the form of Tender submitted by the Applicant in the Request for Review bore the name of Crane AB. - (pages 19 -20 of the Decision)

8) The Board acknowledged the submission on behalf of the De La Rue International Limited that grievance regarding Addendum Number 3 was time barred as of 22nd November 2017 as it was brought to the attention of the Applicant on 8th November 2017 - (page 23, paragraph 1 of the Decision)

9) In its analysis of submissions made by the Parties during the hearing of the Request for Review, the Decision does not reflect the clarifications sought by the Board Members and oral submissions made on behalf of both Crane AB and Central Bank that the notification of award and non-award was sent and received by email on 30th November 2017- (page 22-23, of the Decision)

10) The Board made a finding that the letter of notification dated 30th November 2017 was dispatched to:

Regional Sales Director

Crane Currency

One Beacon Street

Boston MA 021018

USA

11) Further that the Board had not cited (sic) any letter of notification addressed to the Applicant (Crane AB) (page 24, paragraph 3 and page 25 paragraph 3 of the Decision)

12) The Board made a finding and held that it cannot engage in an inquiry regarding how and when a bid was notified of the outcome of its Tender and further that the only evidence that the Board is obliged to look at is evidence showing that the letter was dispatched to the bidder through the right address and further evidence of when the properly addressed letter was received by the bidder. (Page 26, paragraph 3 of the Decision)

13) The Board noted with approval the holding of the High Court in Judicial Review Number 540 of 2008 that the issue of preference and reservation was a mandatory requirement of law which a procuring entity was bound to consider while evaluating a tender submitted to it in a procurement process. The Board accordingly held that the Procuring Entity (Central Bank) was under an obligation to determine whether any of the bidders was or were entitled to benefit from local preference provisions under the Act and Regulations (Page 55, paragraph 2 and page 56 paragraph 3 of the Decision)

14) The Board noted the steps taken by De La Rue International Limited to apply and qualify for local preference at the following parts of the Decision:

(1) During Tender Opening on 22nd November 2017 it was noted that De La Rue International had indicated that they would print the new design currency locally if successful. A justification letter was enclosed in the Tender submission – page 57 paragraph 1 of the Decision.

(2) The Tender evaluation committee approved the request by De La Rue International Limited to subcontract the currency printing process to its affiliate. The Committee determined that De La Rue International Limited had submitted enough evidence to prove that it could print the banknotes locally - page 57 paragraph 2 of the Decision.

(3) The Accounting Officer of the procuring Entity had approved the request and recommendation to subcontract on 29th November 2017, (page 58 paragraph 1 of the Decision)

15) The Board proceeded on the basis and finding that to qualify for preference under the provisions of sections 155(3)(a) and 157(8)(b) of the Act, De La Rue International Limited, the Applicant herein needed to demonstrate that it has the capacity in its own right to manufacture, print, produce or assemble the bank notes in Kenya as a bidder. (page 63 paragraph 3 of the Decision)

16) The Board also proceeded on the basis and finding that the subcontracting provision of Clause 3.15.1 set out in the General Conditions of Contract was only applicable after the award of the Contract. (page 66 paragraph 5 and page 67 paragraph 2 of the Decision).

17) It was the Board's finding that the letter of intention to subcontract and its approval cannot be used in granting a bidder preference since it is 'not only speculative in nature but also not binding on the bidder...', (page 67-8 of the Decision)

18) Crane AB and De La Rue International Limited were both foreign companies which did not both produce any evidence of eligibility under the Preference and reservation provisions of the Act and the regulations were not entitled to preference. (page 68 paragraph 3 of the Decision)

69. The Board, it was averred, concluded its decision by making the following two primary orders:

a) A declaration be and is hereby issued declaring that the 2nd Respondent herein De La Rue International Limited was unlawfully awarded the Tender No. CBK/37/2017-2018 for the printing and supply of the new design Kenya currency and Bank notes and that the Application of a 15% preference margin in its favour was unlawful and that the award of the said tender to the 2nd Respondent as contained in the 1st Respondent's letter of notification award dated 30th November, 2017 be and is hereby annulled.

b) The 1st Respondent is directed to undertake a fresh evaluation of all the tenders submitted to it by all the four bidders who participated in the tender process herein and complete the said process within a period of fourteen (14) days from the date of this decision and in doing so, the Procuring Entity shall take into account the Board's observations on the issue of preference together with the provisions of Section 82 and 86(1)(a) of the Public Procurement and Asset Disposal Act and any award made shall be made in strict compliance with the award criteria set out under Clause 2.27.4 of the tender document

70. The grounds upon which the 2nd Applicant based its application were as hereunder:

1. **THAT** the Respondent's decision contained in the Board Decision dated 8th January 2018 is ultra vires as the Board does not have jurisdiction to hear and determine the Request of Review filed out of time and by a party that was not a bidder.
2. **THAT** the Respondent's decision making declaratory order that the award of the Tender to the De La Rue International was unlawful, is ultra vires section 173 of the Public Procurement and Asset Disposal Act.
3. **THAT** the Respondent also made the decision without regard to several relevant matters that were brought to its attention and took into account irrelevant matters. As a result, the Respondent arrived at a wrong and an unreasonable decision.
4. **THAT** the Respondent's decision is irrational and is based on numerous errors of precedent fact.
5. **THAT** the Respondent's decision to direct the CBK not to apply preference and reservation in the fresh evaluation is ultra vires Section 80 (2) and 155 (3) of the Act.

71. According to the 2nd Applicant, the Board's decision dated 8th January, 2018 was ultra vires, unlawful and reasonable and in making the decision, the Respondent overreached its mandate and jurisdiction under sections 167(1) and 173 of the Act. It was also contended that the Respondent arrived at the said decision without regard to several relevant matters that were brought to its attention while taking into account irrelevant matters and as a result, the Respondent arrived at a wrong and an unreasonable decision.

72. It was further contended that the Respondent's decision was erroneous and unlawful and was based on a misdirection on the relevant law and that its direction that preference and reservation is not to be applied in the re-evaluation is ultra vires section 80(2) and 155(3)(a) of the Act.

73. In its submissions, which were highlighted by its learned counsel, **Mr Ngatia**, the 2nd Applicant averred that the following are the issues for determination arising from the grounds set out in the judicial review application and the facts set out above which according to the 2nd Applicant should be answered in the affirmative:

- (a) **Whether the Respondent's decision dated 8th January 2018 is ultra vires as the Board does not have jurisdiction to hear and determine a Request of Review filed out of time and by a party that was not a bidder.**
- (b) **Whether the Respondent's decision making declaratory order that the award of the Tender to the De La Rue International was unlawful, is ultra vires section 173 of the Public Procurement and Asset Disposal Act.**
- (c) **Whether the Respondent's decision was without regard to relevant matters that were brought to its attention and took into account irrelevant matters.**
- (d) **Whether the Respondent's decision is irrational and is based on errors of precedent fact.**
- (e) **Whether the Respondent's decision to direct the 1st Interested Party not to apply preference to the Ex Parte Applicant in the fresh evaluation is ultra vires Section 80 (2) and 155 (3) of the Public Procurement and Asset Disposal Act.**

74. According to the 2nd Applicant, the Respondent's jurisdiction to entertain Requests for Review arises from section 167(1) of the Act.

75. The Board would therefore not have jurisdiction over a Request for Review filed by an entity that was not a candidate or tenderer in the Tender giving rise to the Request for Review. The terms "candidate" and "tenderer" are defined in section 2 of the Act.

76. In PPARB No 108 of 2017 the 2nd Applicant contended that there was no evidence to show that **Crane AB** obtained the tender documents from the Procuring Entity or that it submitted a tender. Further, it was contended and not rebutted that the prequalified suppliers under the Prequalification Tender were **Giesecke & Devrient, Crane Currency, De La Rue International Limited and Oberthur Fiduciaire** only. There was no mention of **Crane AB**. Having not been prequalified in the Prequalification Tender, **Crane AB** could not possibly have been a tenderer/candidate in the Restricted Tender.

77. The 2nd Applicant further averred that the Request for Review was in any event filed out of time. Section 167(1) as cited above stipulates that an Application for Review ought to be filed within 14 days of the "...notification of award or date of occurrence of the alleged breach at any stage of the procurement process...". It was submitted that in the Request for Review, **Crane AB** had expressed grievance over both an addendum issued by the 1st Interested Party on 8th November 2017 ("Addendum No 3") and the eventual award of the Tender to the Ex Parte Applicant as per the Letter of Non-Award dated 30th November 2017. At paragraphs 1(c), (d) and (e) of the Request for Review the 4th Interested Party contended that Addendum No 3 was unlawful as it made provisions allegedly founded on the wrong law – the 2015 Act. **Crane AB** claimed that the applicable law was the 2005 Act. At Paragraph 2(h) **Crane AB** again impugned Addendum No 3 contending that it was issued to tilt the tender in favour of the Ex Parte Applicant.

78. It was however submitted that Addendum No 3 was brought to the attention of the 4th Interested Party on 8th November 2017. Going by the limitations stipulated by Section 167(1) any Request for Review regarding the Addendum should have been filed on or before 22nd November 2017. **Crane B** was therefore specifically time-barred from prosecuting any grievance relating to the alleged unlawfulness or unfairness of Addendum No 3 under PPARB No 108 of 2017 filed on 19th December 2017.

79. Besides, Crane AB received the notification of non-award on 30th November 2017 and acknowledged it on 1st December 2017. In the course of the hearing of the Request for Review, the Board asked the CBK how and when the letter of non-award was sent to the bidders and CBK informed the Board and it was not rebutted that the communication was sent by email on 30th November 2017. Similarly, **Crane AB** through its counsel informed the Board that they received the letter by email on 30th November 2017. However, in the final decision, the Respondent did not address itself to the issue of how and when the notification was received. Particularly, at Page 26, paragraph 3 of the Decision the Respondent declared that it cannot engage in an inquiry regarding how and when a bidder was notified of the outcome of its Tender and further that the only evidence that it is obliged to look at is evidence showing that the letter was dispatched to the bidder through the right address. Though the Board commented that it was further obligated to interrogate evidence of when the properly addressed letter was received by the bidder, it did not comment on the fact that it was not in dispute that **Crane AB** had admitted and it was not in dispute that the notification was received on 30th November 2017.

80. It was submitted that the Respondent instead took a tangent and laid undue emphasis on the postal address appearing on the face of the letter of notification on non-award. The Board was of the view that since the postal address appearing on the face of the letter was the wrong address, the notice was improper. This was despite the clarification sought and given that the letter was sent by email rather than by post. The Board did not enquire whether in fact the letter was dispatched to the said wrong address neither did it address itself to what amounts to an improper notification as stipulated under section 87(3) of the Act.

81. It was submitted that the notification issued by the 1st Interested Party on 30th November 2017 was therefore a proper notification within the meaning of section 87(3) of the Act. It named the successful bidder and gave succinct reasons for awarding the tender to the successful bidder. More importantly there was no dispute that it was received on 30th November 2017. The Act does not envisage that the address appearing on the face of a notification would be a determinant of the correct form and or content of the notification.

82. It was submitted that had the Respondent correctly addressed itself to the issue of notification of non-award, it would have reached the correct determination that under section 167(1) of the Act **Crane AB** was barred from filing the Request for Review after 14th December 2017 which fell on the 14th day after the date of notification i.e. 30th November 2017. The Request for Review filed on 19th December 2017 was filed 5 days out of time.

83. Further, if **Crane AB** was aggrieved by the content and or any apparent insufficiency of the notification of 30th November 2017, it would be required to challenge the purported insufficiency as a matter of breach under section 167(1). Going by the decision of the High Court in **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 others Miscellaneous Application 250 of 2015**, an error in the notification of non-award, does not take away the right of an unsuccessful bidder to immediately seek review.

84. In any event, the finding by the Respondent that the notification of 30th November 2017 was not a proper notification would invite the inference that a notification has not yet been issued and hence the Request for Review is premature and relied on **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 others Miscellaneous Application 250 of 2015**.

85. The 2nd Applicant further relied on **Republic vs. Centre for Mathematics, Science & Technology & 2 Others Ex parte Apex Security Services Limited Misc Application No 21 of 2015** and submitted that the Board only has jurisdiction over a Request for Review filed within the prescribed timelines under Section 167(1) of the Act and can only act to the limited purpose of downing its tools once it becomes apparent that it has no jurisdiction hence the Respondent's decision was ultra vires. In this case, the Board by craft of discretion introduced and based its decision on the issue of postal address and impropriety of form of the notification which was not pleaded or part of **Crane AB's** case. By so doing, the Board misdirected itself and consequently arrived at an erroneous decision that it had jurisdiction in the matter.

86. It was contended that the Board did not specifically address itself to the following two fundamental questions regarding jurisdiction given the contention on limitation of time: which decision and/or breach was the Request for Review based on? And, when did the complaining bidder receive and/or have notice of the decision of the breach?

87. According to the 2nd Applicant, in responding to the request for review it was and it remains its submission that the question of local preference emanates from and was applied by the 1st Interested Party in accordance with the provisions of the Act, the Tender Document and Addendum No 3. Addendum No 3 gave better detail on the applicability and qualification for local preference. It referred the tenderers to the relevant provisions of the Act and Clause 2.25.1 of the Tender Document. Further it clarified that it would be incumbent upon the Tenderers to demonstrate their qualification for preference and that the margin would be 15%. This clarification came before the tenderers submitted their bids. **Crane AB** did not object to the Addendum nor did they seek any further clarifications thereon. More importantly they did not take steps to demonstrate their own qualification for preference as permitted by the tender document, Addendum No 3 and the Act.

88. It was submitted that tender documents are the ultimate pedestal of tenderers' legitimate expectation of the tests, standards and evaluation that they would be subjected to in their bids. This aligns with the holding of the High Court in **Republic vs Kenya Revenue Authority & Another Ex Parte De La Rue Company and Security Print Limited Misc Civil Application No 540 of 2008** where the tender documents had (as is in the present case) expressly promised local preference. In this respect the 2nd Applicant relied on section 80(2) of the Act which dictates the primacy of tender documents in evaluation and comparison.

89. It was contended that the Respondent does not have powers to evaluate tenders as its powers are limited to making orders and giving directions arising from a determination that there has been a breach of the Act or regulations. The assertion by the Respondent that the Ex Parte Applicant did not produce any evidence of eligibility under preference is a usurpation of the evaluation committee's mandate. To the 2nd Applicant, the Respondent in effect agreed with **Crane AB's** contention that the procuring entity should disregard the preference criteria as set forth under the tender documents because the Ex Parte Applicant is a foreign entity. The implication is that re-evaluation as ordered would be illegal and contrary to the aforesaid sections 80(2). The section makes it mandatory for procuring entities to undertake evaluation strictly in compliance with criteria set out in tender documents. It is preposterous and illegal to direct the procuring entity to disregard the

law.

90. It was further submitted that the stance taken by the Respondent also flies in the face of the provision of section 155(3)(a) of the Act. The Respondent's interpretation of this section was that a procuring entity can only qualify for preference under section 155(3)(a) if it personally and or directly manufactures or assembles the materials in Kenya. To the 2nd Applicant, this conclusion is irrational as it presupposes that it is not possible for an entity to execute a contract in part or even wholly through another entity. This was despite the clear demonstration by the Ex Parte Applicant of steps it had taken to execute the Tender through its Kenyan affiliates using resources situated in Kenya. The steps shown were in line with the guidance provided by the Court in **Republic vs. Kenya Revenue Authority & Another Ex Parte De La Rue Company and Security Print Limited Misc Civil Application No 540 of 2008** a case arising from a Tender for the printing of high security self-adhesive stamps for the Kenya Revenue Authority.

91. From the test above, the Ex Parte Applicant only needed to provide documentary proof that the printing of the bank notes under the Tender would be done in Kenya. This and more was done by:

- (i) Proving the affiliation with the 3rd and 4th Respondents.
- (ii) Establishing the existence and ownership of the Ruaraka high security printing Factory.
- (iii) Demonstrating technology transfer potential.
- (iv) Obtaining approval of the Procuring Entity to subcontract the Tender to a local entity as per the terms of the Tender Documents.
- (v) Attaching as an Appendix 1 a detailed pitch for local preference on account of the proposed local manufacturing

92. The Respondent also erred in drawing a conclusion that the only way the Ex Parte Applicant could properly show an intention to undertake the Tender through its Kenyan entity was if there had been a Joint Venture Agreement between the Ex Parte Applicant and the said affiliate.

If the 2nd Respondent [Ex Parte Applicant] had intended to benefit from any preference scheme then it ought to have submitted it's tender in Joint venture with what it calls its affiliates/subcontractors which it did not do.

93. The Respondent drew the conclusion that Ex Parte Applicant's request to subcontract the tender if successful and the approval was not sufficient proof of the intention. This too amounted to the Respondent usurping the discretion of the procuring entity's evaluation committee. In belittling the value of the letter of intent, the Board is in fact attacking the merit of the decision taken by the evaluation committee and thereby taking the Evaluation Committee's place as the assessor of the bids. The Board does not have such powers which rest with the procuring entity. The mandate to determine whether or not the material provided by the Ex Parte Applicant met the threshold for preference lies exclusively with the evaluation committee and reference was made to **Republic vs. Public Procurement Review Board & 2 Others ex-parte MIG International Ltd & Another [2016] eKLR.**

94. It was therefore submitted that the actions of the Board amount remarking the bids, a power the Board does not have as was held in the case of **Republic vs. Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology [2016] eKLR.**

95. The Respondent was also accused of having overstepped its mandate by dictating to the evaluation committee not to apply preference which is a statutory requirement under section 155(1) of the Act. It further amounts to directing the procuring entity to disregard its own tender document and thereby breach section 80(2) of the Act and the 2nd Applicant relied on **Republic vs. Public Procurement Administrative Review Board Ex-parte Kenya Medical Supply Agency & 3 Others [2010] eKLR.**

96. The inference that lends itself in the present circumstances is that the Respondent's decision dated 8th January 2018 is null and void to the extent that the Respondent overstepped its mandate as shown above.

97. It was further submitted that in its final orders, the Respondent overreached its mandate as prescribed under section 173 of the Act by purporting to declare unlawful and annulling the award of the Tender to the Ex Parte Applicant yet section 173 does not give the Respondent such powers. In its wording and implication section 173 does not envisage such wide powers.

98. According to the 2nd Applicant, the High Court has recently expressly interpreted the powers of section 173 of the Act not to extend to annulment of the decision of a procuring entity or its evaluation committee in the case of **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte Kenya Power and Lighting Company Limited [2017] eKLR.**

99. The sum effect of this interpretation which, according to the 2nd Applicant, is the correct position of the law as it is currently is to limit the orders which the Board can give in a Request for Review to strictly those that are expressly provided for under section 173. No powers are to be inferred. Further and in particular section 173 does not extend the procuring entity's powers to annulling the decision of the procuring entity and or its evaluation committee.

100. It was further submitted that the Respondent did not take into consideration several relevant matters and took into irrelevant ones and that the following are the highlights of some of the instances in the decision of the Respondent where the Respondent disregarded relevant facts and in other instances based its decision on irrelevant facts and matters:

a. The Board noted but disregarded the fact that the matter before it was a review against the decision of the Central Bank of Kenya which was communicated in its letter of notification dated 30th November, 2017 in the matter of Tender No. CBK/37/2017-2018 – (page 1 paragraph 1 of the Decision). The Board event noted that the letter of notification to CRANE AB dated 30th November 2017 was the trigger for the Request for Review application –(page 58 paragraph 2 of the Decision). Despite the foregoing, the Board still made a finding that the Request for Review was not filed out of time.

b. The Board noted that De La Rue international Limited (Tenderer No 3) had the highest technical score – 98% which constituted printing capability, printing timelines, quality assurance, risk management, security, public education, solvency and liquidity – (page 6, paragraph 2 of the Decision). The Board however disregarded this apparent fact and held that the Ex parte Applicant had not demonstrated capacity.

c. The Board acknowledged the submission on behalf of the Procuring Entity – Central Bank that Crane AB was a stranger to the proceedings as it was not prequalified - (page 14, paragraphs 2 and 3 of the Decision). The board despite recording this contention did not interrogate it or even comment on its veracity despite its obvious relevance to the question as to whether Crane AB would be a proper candidate and or tenderer in the restricted tender.

d. The Board acknowledged the submission on behalf of the De La Rue International Limited that grievance regarding Addendum Number 3 was time barred as of 22nd November 2017 as it was brought to the attention of the Applicant on 8th November 2017 - (page 23, paragraph 1 of the Decision). The Board however did not address the contention as to its merit or otherwise.

e. In its analysis of submissions made by the Parties during the hearing of the Request for Review, the Decision does not reflect the clarifications sought by the Board Members and oral submissions made on behalf of both Crane AB and Central Bank that the notification of award and non-award was sent and received by email on 30th November 2017- (page 22-23, of the Decision). Needless to say the question as to when Crane AB received the notification was central to determination of jurisdiction. The Board therefore abdicated its duty by declaring (at Page 26, paragraph 3 of the Decision)that it would not engage in such an inquiry.

f. The Request for Review did not raise or plead the issue of whether the address on the notification dated 30th November 2017 was wrong or prejudicial. Indeed, the question as to the address printed on the letter of notification is irrelevant if receipt of the notification is not disputed. Despite this the Board dwelt on the incorrectness of the address appearing on the letter and erred by making a finding that the letter of notification dated 30th November 2017 was dispatched to:

i. Regional Sales Director

ii. Crane Currency

iii. One Beacon Street

iv. Boston MA 021018

v. USA

and further that it (the Board) had not cited (sic) any letter of notification addressed to the Applicant (Crane AB) (page 24, paragraph 3 and page 25 paragraph 3 of the Decision). Notably, there was no material presented or submissions made by any of the parties that the letter had been dispatched to the address printed on the letter. In fact the parties were all in agreement that the letter was sent and received on email on 30th November 2017. Besides, it was never Crane AB's complaint that it had not received a letter of notification from the 1st Interested Party. The issue of the address to which the letter was dispatched was therefore irrelevant and extraneous yet it formed the foundation upon which the Board based its decision dismissing the preliminary objection on the issue of jurisdiction.

g. The Respondent did not fully appreciate the content of the material provided by the Procuring entity on the Ex Parte Applicant's qualification to preference. The Respondent did not consider the practical viability of the Ex Parte Applicant actually executing the tender in Kenya even though it is a foreign company. The court in basing its decision on whether or not there was a joint venture agreement with the local affiliates and or whether or not the Ex Parte Applicant in fact had local resources in its own name was an irrelevant fact. The Board did not even consider the origin of the goods to be supplied as per the Ex Parte Applicants bid form.

101. Given the foregoing errors of fact, misapprehension of relevant facts and by overlooking relevant ones, it was submitted that the Respondent fell in error similar to the one dealt with by the Court in the case of where it was stated as follows:

For this reason I find and hold that both the Procuring entity and the Board had overlooked important factual matters because the establishment of the origin of goods and where manufactured were important precedent facts to the application of the correct margin of preference.

I endorse the applicant's contention that for the Procuring entity to unilaterally and without inquiring decide that the Kenyan Applicant company was producing goods in the UK because the reference of UK/Kenya in one sentence even in the face of the above details on the origin of goods and then proceed to evaluate the tender on the basis of this unilateral and wholly mistaken assumption is an egregious breach of good governance, rule of law and contravenes the provisions of the tender documents, the Procurement Act and the Regulations.

In a situation such as this case where the decision makers have gotten materials facts and law wrong, I find and hold that the court is entitled to review both facts and law. This option is set out in Michael Fordham JUDICIAL REVIEW HANDBOOK paragraph 38-39;

"In relation to factual matters, intervention by the reviewing court is warranted where there is:

- (1) an incorrect finding as to precedent fact; or**
- (2) an irrational conclusion of fact".**

Generally speaking factual questions are seen alongside questions of discretion) as matters within the public body's field of judgement, to be subjected only to soft review. This stance is fortified by the realization that public bodies are perfectly well-equipped to deal with questions fact; and that the legislature has entrusted such matters to them. As always, however, all is not deference. In the first place, the infirmities of the fact/law distinction no doubt provide ready scope for a reviewing court anxious to intervene. There are even hits of factual error being characterized as 'ultra vires'. More respectably perhaps, the critical balance is found in a traditional two-tiered review whereby a factual matter may be either be: (a) a hard-edged question which the body is not entitled to get wrong (precedent fact); or (b) a soft question which the body is not entitled to get badly wrong (irrationality)".

Having gotten facts which it was not entitled to get wrong (precedent fact) and also getting facts concerning origin of goods badly wrong this did constitute (irrationality) hence this court is entitled to intervene.

102. Guided by Council For Civil Service Union & Minister For Civil Service [1985] AC 374 at 401 D the 2nd Applicant contended that it has been shown that the following aspects of the Respondent's decision dated 8th January 2018 are so outrageous and defiant of logic that no reasonable person who had applied his mind to the question to be decided could have arrived at it.

(a) If the Crane AB was not prequalified in the Prequalification Tender of 2014, it couldn't have been a candidate and or tenderer under the restricted tender. Logic follows that it did not have locus standi in PPARB 108 of 2017.

(b) The Applicant in PPARB 108 of 2018 admitted that it received the notification of non- award on 30th November 2017. Despite this the Board took the view that notification had not been conveyed on 30th November 2017.

(c) No material was placed before the Board nor contention made that the letter of notification had been dispatched by post to the address *Regional Sales Director Crane Currency One Beacon Street Boston MA 021018USA* printed on the face of the notification letter; yet the Board made a finding to the effect that the letter had been dispatched to the address.

(d) Despite having a mandate limited to administrative oversight role on the Accounting officers of procuring entities (as per section 173 of the Act), the Respondent bestowed on itself the role of evaluating and remaining the bids a role manifestly reserved for the tender evaluation committee, passing a declaratory order and annulling a decision of the procuring entity whereas under section 173 it has no such powers.

(e) The Board drew an outrageous inference that the only way the Ex Parte Applicant could demonstrate local capacity hence local preference qualification is if it had a joint venture agreement with its local entity and if it owned the local banknote printing resources in its own name.

103. The Ex parte Applicant therefore submitted that it had met the threshold for the grant of an order of certiorari to quash the Respondent's decision dated 8th June 2018 in its entirety as well as the costs to be paid .by the Respondent.

The Interested Parties' Case

104. The interested parties herein allied themselves to the positions adopted by the 1st and 2nd Applicants but opposed the 3rd Applicant's case. In so doing they relied on the following grounds of opposition:

- 1) The Respondent lacked jurisdiction to hear and render the impugned decision arising from the review filed by the 3rd Ex-**

Parte Applicant.

- 2) The Respondent's decision of 8th January 2018 is tainted as it is irrational, unreasonable and ultra vires to the powers of the Respondent.**
- 3) The orders sought by the 3rd Ex-parte Applicant are contrary to the law and are incapable of being granted as prayed.**
- 4) Consequently, the Application as drawn lacks merit and should be struck out with costs to the 1st and 2nd Interested Parties.**

105. The said interested parties associated themselves with the positions adopted by the 1st and 2nd applicants.

106. Apart from reiterating the 1st and 2nd Applicants' submissions, the interested parties submitted that in submitting its bid for the Print Tender, the 2nd Ex-parte Applicant clearly indicated that the 1st and 2nd Interested parties, which are Kenyan-based companies, are its local affiliates which it had subcontracted to perform the substantial portion of the Print Tender should it win the bid. On the account of the foregoing, the 2nd Ex-parte Applicant successfully applied for preference given the fact that it was using Kenyan based companies which would use materials, articles and supplies produced or assembled in Kenya.

107. It was averred that the 1st Ex-parte Applicant then evaluated the bids it had received from the prequalified bidders and on 30th November 2017, it informed them (including Crane Currency) that the Print Tender was awarded to the 2nd Ex-parte Applicant and that for the other prequalified bidders, their bids was not successful. This decision prompted the 3rd Ex-parte Applicant, who was neither one of the prequalified bidders nor a tenderer, to apply to the Respondent to review the decision of the 1st Ex-parte Applicant and in its decision of 8th January 2018, the Respondent allowed the application for review, nullified the tender that had been awarded to the 2nd Ex-parte Applicant and directed the 1st Ex-parte Applicant to reevaluate the bids.

108. The 1st and 2nd Interested Parties submitted that in reaching its decision of 8th January 2018, the Respondent committed a critical error of law and in fact acted without jurisdiction by entertaining an application filed against the 1st Ex-parte Applicant, an independent constitutional body, which is not subject to the to the directions or supervision of any administrative entity; it entertained an application for review filed by a stranger to the procurement process of the Print Tender contrary to the law; and it entertained an application filed out of the timeline set by statute.

109. According to the interested parties, the 1st Ex-parte Applicant is a creation of the Constitution of Kenya 2010 ("the Constitution") which provides in Article 231(3) of the Constitution that in the performance of its functions, Central Bank of Kenya is to enjoy independence from control or direction of any entity or authority including the Respondent as follows:

"The Central Bank of Kenya shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions"

110. According to the interested parties, Article 231(3) sets out the functions of the 1st Ex-parte Applicant to include issuing currency. Further, Article 231(4) provides that the 1st Ex-parte Applicant is to issue coins and notes which shall not bear the portrait of any individual. In carrying out the procurement process for Print Tender, the 1st Ex-parte Respondent is performing its constitutional functions and therefore ought to enjoy independence and be free from control and direction of any person or authority.

111. It was their submission that the independence and freedom from control granted of the 1st Ex-parte Applicant is unique and is not available to most constitutional organs established under the Constitution. For example, the Kenya National Human Rights and Equality Commission (Article 59), National Land Commission (Article 67), the Independent Electoral & Boundaries Commission (Article 88) and the National Police Service (Article 246) and many other constitutional organs do not enjoy similar status as that of Central Bank of Kenya. The interested parties however clarified that it is not all functions of the Central Bank of Kenya that would be exempt from control or direction by any person or authority. It is only the functions set out under Article 231(2) of the Constitution that are free from such interference.

112. It was therefore submitted that the Respondent misled itself in mischaracterizing the submission of the 1st and 2nd Interested Parties by proceeding on the basis that all procurement by the Central Bank of Kenya is exempt from review. To the contrary, the legal point to appreciate is that the specific functions that are excluded are only those under Article 231(2) aforesaid and critically, this exemption does not mean that there is no oversight of the procurement function at all. The courts are specifically empowered to review the functions that are specifically stated to be protected from direction or control by any other person or authority.

113. In support of their case the interested parties relied on **Electoral Commission of Kenya vs. Attorney General & 2 Others [2007] eKLR.**

114. In the circumstances, the Respondent acted without jurisdiction as it could not legally sit to determine the request for review. It is even more absurd that in its decision of 8th January 2018, it purported to direct the 1st Ex-parte Applicant on how it should conduct its constitutional functions. The impugned decision should therefore be set aside.

115. It was submitted that in Kenya, the process of procurement of currency notes in Kenya is one dealing with issuance of the currency and is not merely a paper procurement exercise as the Respondent seemed to state as it issued its impugned decision.

116. The 1st and 2nd Interested Parties therefore urged this Court to allow the 1st and 2nd Applications filed by the 1st and 2nd Ex-parte Applicants; and to dismiss the 3rd Application, filed by the 3rd Ex-parte Applicant, with costs to the 1st and 2nd Interested Parties as well as to the 1st and 2nd Ex-parte Applicants.

3rd Applicant's Case

117. The 3rd Applicant opposed the 1st and 2nd Applicant's case and filed its own application in which it also sought orders in the nature of judicial review.

118. I must however point out that during the pendency of this judgement the 3rd Applicant applied to withdraw its application which application for withdrawal was opposed by the other parties and the fate of the same will similarly be decided in this judgement.

119. According to **Crane AB**, on 24th October, 2017, the Central Bank issued a Restricted Tender Referenced CBK /37/2017-2018 for printing and supply of new design Kenya Currency Banknotes and the following entities i.e. Crane AB, Giesecke & Devrient, De La Rue International Limited and Oberthur Fiduciaire were the only entities that participated in the said Tender.

120. At a later stage in the Tender process, a variation to the tender process was issued by the Central Bank (*in reliance upon Sections 155 and 157 of the Public Procurement and Disposal of Assets Act 2015*) on 8th November 2017, via Addendum No. 3 which Addendum provided that the provisions of the Act on preferences and reservations would be applied to tenderers who would demonstrate that they were thus entitled. Further, tenderers seeking to sub-contract part or whole of the contract were to obtain express authority of the Procuring Entity.

121. It was averred that in a purported letter of Notification of the Award dated 30th November 2017, the Procuring Entity stated that although **Crane AB** had passed all mandatory technical evaluations, they could not be awarded the Tender due to its failure to qualify at the financial evaluation stage pursuant to section 86(1)(a) of the Act. By letter dated 1st December, 2017, Crane AB sought a clarification from the Bank on:-

i) How the Applicant had failed on the financial evaluation and yet at the opening of the tender on 22nd November 2017, it was clear that the Applicant had submitted the lowest bids for both Lot 1 and Lot 2 and

ii) How the 2nd Respondent qualified to be accorded preferential treatment in the Tender.

122. It was averred that the Bank responded via a second Notification dated 5th December, 2017 and in **Crane AB's** opinion, the reasons given were unsatisfactory and the company sought further clarifications vide a letter dated 13th December, 2017. However it was the letter of 5th December 2017 prompted **Crane AB** to file a Request for Review against the Bank, with De La Rue International and its alleged local affiliates as co-respondents. The Respondents in addition to filing their respective Memorandums of Response, all raised Preliminary Objections against the Request for Review by Crane AB.

123. It was averred that on the 8th January 2018, the Board rendered its decision after considering the merits of the Request for Review and made the following orders:

1. A declaration be and is hereby issued declaring that the 2nd Respondent herein De La Rue International Limited was unlawfully awarded the Tender No. CBK/37/2017-2018 for the printing and supply of the new design Kenya currency and Bank notes and that the Application of a 15% preference margin in its favour was unlawful and that the award of the said tender to the 2nd Respondent as contained in the 1st Respondent's letter of notification award dated 30th November, 2017 be and is hereby annulled.

2. The 1st Respondent is directed to undertake a fresh evaluation of all the tenders submitted to it by all the four bidders who participated in the tender process herein and complete the said process within a period of fourteen (14) days from the date of this decision and in doing so, the Procuring Entity shall take into account the Board's observations on the issue of preference together with the provisions of Section 82 and 86(1)(a) of the Public Procurement and Asset disposal Act and any award made shall be made in strict compliance with the award criteria set out under Clause 2.27.4 of the tender document.

3. Any party aggrieved by any decision that the Procuring Entity will arrive at the conclusion of the fresh evaluation process shall be at liberty to seek any such remedy as it deems fit from the Board.

4. Owing to the nature of the orders made above, the Board directs that each party shall bear its own cost of this Request for Review.

124. In its decision, the Board highlighted the following issues for determination and made findings as follows:

Issue 1: Whether or not the Applicant has the *locus standi* to institute the present Request for Review under the provisions of section 167(1) of the **Public Procurement and Asset Disposal Act, 2015**.

Findings: In view of the information contained in the tender document and more particularly that in the form of tender, the Board finds that the tenderer in this procurement process was Crane AB, which is the Applicant herein and not Crane Currency as alleged by the Respondent. In view of the above findings the first ground of the preliminary objection as set out

under the first issue framed for determination therefore fails and is disallowed.

Issue 2: Whether or not the Board has the jurisdiction to hear and determine the Request for Review on the ground that it was filed out of time contrary to the provisions of section 167(1) of the **Public Procurement and Asset Disposal Act, 2015**.

Findings: On the second issue framed for determination, the Board has already held that Crane AB the Applicant herein was the Bidder in this procurement process and not Crane Currency. The Board has already stated the Applicant's address as set out in the form of tender submitted by it to the Procuring Entity which is:- Crane AB SE- 14782 Tumba Sweden T+46857869500 F+468857869800 Info@cranecurrency.com; www.cranecurrency.com.

The Board has looked at the letter of notification dated 30th November, 2017 appearing at page 00072 of the 1st Respondent's bundle of the memorandum of response and finds that the said letter was dispatched to the following address:- Regional Sales Director Crane Currency One Beacon Street Boston MA 021018 USA.

It is apparent from all the above that the two addresses are not the same. Under the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act, every Procuring Entity is under an obligation to specifically serve a letter of notification on the bidder who has participated in a procurement process and where that has not been done, the Board cannot strike out a Request for Review on the ground that the same was filed out of time.

The Board has looked at all the letters of notification submitted to it by the Procuring Entity and has not cited any letter of notification addressed to the Applicant and in the absence of such evidence, the Board finds that the Applicant who was the bidder in this procurement process was not served with a letter of notification as required by the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act.

Issue 3: Whether or not the Applicant contravened the provisions of section 167(2) of the Public Procurement and Asset Disposal Act by failing to pay the refundable deposit of 10% while filing the Request for Review.

Findings: A reading of the Provisions of Section 167(2) of the Act makes the said provision only applicable upon the promulgation of Regulations to govern the manner of operation of the requirement on the refundable deposit. The Board however takes judicial notice of the fact that no Regulations have been promulgated under the Provisions of the new Act and the Board cannot therefore strike out the Applicant's application on that ground.

Issue 4: Whether or not the 1st Respondent, the Central Bank of Kenya is subject to the supervision of the Board and or Court while undertaking a procurement function.

Findings: The Board further wishes to state where a Public Entity uses public funds in undertaking any procurement process, then it is subject to supervision by the Board and this position is illustrated by the case of Republic –vs Public Administrative Review Board, Machiri Limited, Athi Water Services Board and Weihia International Economic & Technical Cooperation Company Ltd [Nai HC Milimani Commercial Courts Misc. JR Application No's 402 & 405 of 2016 (consolidated)].

The Board also finds that the Central Bank of Kenya while carrying out a procurement function meant to identify a firm to print legal tender is not in any way deemed to be issuing any currency and intervention by the Board or the Court cannot therefore be said to be interference with the central Bank in carrying out its mandate under the provisions of Article 231(3) of the constitution of Kenya 2010.

Issue 5: In the event that the Board has jurisdiction to hear and determine the Request for Review now before it, whether or not the 2nd Respondent was entitled to the benefit of the 15% margin of preference for the purpose of financial evaluation.

Findings: Based on the above uncontested fact, the 2nd Respondent, (the Successful Bidders) was and could not therefore qualify to be granted preference on the basis that it was a citizen contractor under the provisions of the Act.

Based on the above findings both the Applicant and the 2nd Respondent which are both foreign companies and which did not both produce any evidence of eligibility under the preference and reservation provisions of the Act and the regulations were not entitled to preference and their financial proposals ought to have strictly been evaluated on the basis of the prices as read out during tender opening as set out in the provisions of section 82 of the Act and an award made pursuant to the provisions of 86(1) (a) of the Public Procurement and Asset disposal Act.

Issue 6: What Orders should the Board make in the circumstances of this Request for Review.

Findings: The Tender Opening Committee however went into the issue of which bidder had applied for a preference consideration. This was not the function of the Tender Opening Committee. The evaluation process therefore started on a wrong footing and the only fair order to make in the circumstances of this case is to order the restart of the evaluation process afresh taking into account the observations which the Board has made above. For all the foregoing reasons the Applicant's Request for Review therefore succeeds and is allowed in terms of the following orders.

126. It was submitted that the Applicants in both Judicial Review proceedings never sought leave of this Court to enable them serve the proceedings on **Crane AB** in Sweden. Aware of the foregoing, **Crane AB** has entered a conditional appearance in this matter to enable Crane AB to challenge jurisdiction of the Court. The failure by the Applicant's to obtain leave as required under law to serve **Crane AB** denies this Court the jurisdiction to determine this matter rendering the proceedings a nullity for want of jurisdiction. It relied on **Roberta Maccledon Fonville versus James Otis Kelly & 3 Others (2002) eKLR**.

127. According to Crane AB whereas previous Rulings had incorrectly held that Judicial Review proceedings could only be brought within the provisions of **Order 53** of the **Civil Procedure Rules**, this is no longer good law and reliance was sought in JR 371, 372 of 2015, - **In the Matter of An Application by Syner-Chemie Limited (2016) eKLR** and **Co-operative Ex-Parte Njuguna Kubai & 2 Others (2005) eKLR**.

128. It was Crane AB's case that the Central Bank and De La Rue International have in their respective Judicial Review applications, introduced documents herein which did not form part of the record before the Tribunal. To them, the record before the Review Board does not show that the Central bank tendered the following documents:

- i. Crane Currency confidential business questionnaire on prequalification of suppliers for the production of bank Note Origination material and currency printing services in respect of tender No. CBK/043/2013/2014 dated 1st July 2014. (PAWK-1)
- ii. Power of Attorney by Crane Currency to one Peter Brown dated 24th June 2014. (PAWK-2)
- iii. Application Form Crane Currency Confidential Business Questionnaire on prequalification of suppliers for the production of bank note origination material and currency printing services in respect of tender number CBK/043/2013/2014 dated 1st July 2014. (PAWK-3)
- iv. Letters dated 9th March 2017 and 14th March 2017 both from Crane AB. (PAWK-4)

129. On the part of De La Rue International's exhibits, copies of the Prequalification Tender Document and the Bids by De La Rue International were not part of the record before the Board.

130. It was therefore contended that it would not be right for this Court to consider the above listed documents as admitting them would be improper. In this respect, Crane AB relied on **Republic versus Public Procurement Administrative Review Board & Another Ex-Parte SGs Kenya Limited (2017) eKLR**.

131. It was **Crane AB's** further submissions that the **Central Bank of Kenya** and **De La Rue International** are, by sleight of hand, introducing issues and documents based on the Pre-qualification Tender which were never raised at the Tribunal stage. It was submitted that during the hearing at the Tribunal and Petition in HCC No. 568 of 2017, the Central Bank admitted that the Pre-Qualification Tender and the printing and supply of the new currency tender were "independent and different" processes, it goes against the rules of natural justice if this Court were to admit for consideration, the new documents and issues presented by Central Bank of Kenya and De La Rue International. Reliance for this line of submission was based on **Ridge vs. Baldwin [1963] 2 All ER 66** and **General Medical Council vs. Spackman [1943] 2 All ER 337**.

132. Crane AB submitted that in view of the foregoing, any evidence or issues not produced and litigated before the Board during the hearing of PPARB Application No. 108 of 2017, should not be admitted or considered.

133. It was Crane AB's case that the jurisdiction of Courts in so far as Judicial Review is concerned has been pronounced in numerous case law and the golden thread that cuts across all decisions and cited **Republic versus Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Limited (2014) eKLR** and **Republic vs. Public Procurement Administrative Review Board & 3 others [2014] eKLR**.

134. **Crane AB** submitted that in these Judicial Review Proceedings, this Court is being asked to consider the evidence that was tendered before the Board, not with a view to consider whether the process of arriving at the decision was right or wrong, but with a view to have this Court reconsider the evidence afresh and arrive at a completely different decision. To the 3rd Applicant, the CBK and De La Rue International have failed to appreciate the parameters of a Judicial Review as opposed to an appeal. A cursory perusal of the grounds being relied upon by both Applicants reveal that their main contention is that the Board lacked jurisdiction to hear and determine the request for review by **Crane AB**. However, a thorough reading of the decision of the Board reveals that the Board extensively considered issues of facts around the question of jurisdiction. It therefore made an informed decision on the question of its jurisdiction to hear and determine the review. It relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte Kenya Power and Lighting Company Limited [2017] eKLR** and **Republic vs. Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] eKLR**.

135. It was therefore submitted that a contrary finding herein will mean that this Court would have usurped the statutory functions of the Board.

136. According to **Crane AB**, the decision by the Board was correct based on the facts and evidence before it. The Board had jurisdiction as provided under the **Public Procurement and Asset Disposal Act** and there was no act of error or omission by the Board which went to its jurisdiction in the wider sense. According to it, the very gist of the two applications confirms that the Bank, and De la Rue International, is surreptitiously out to seek an appeal against the decision of the Board and relied on **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR**.

137. The above position, according to Crane AB was also adopted in **Republic vs. Kenya Revenue Authority & Another Ex-Parte Bear**

Africa (K) Limited where **Majanja J.** quoted with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR.**

138. **Crane AB** submitted therefore that in rendering its decision of 8th January 2018, the Board did not in any way, act ultra vires but considered all relevant facts and matters and in coming to its conclusion, it extensively considered all the issues.

139. In its view the issues and grounds highlighted hereinabove, clearly demonstrate that these proceedings are an attempt by the Applicants' to appeal against the decision of the Board. However, this Court has no powers to sit as an Appeal Court against the decision of the Board. As was rightly held by your lordship in **Republic vs. Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited [2016] eKLR.**

140. **Crane AB's** position was that the conduct by the Central Bank of Kenya and De La Rue International demonstrate an obvious collusion between the two in manipulating the tender. According to it, the events around the award of the Tender to the 2nd Respondent were clouded with lack of transparency, lack of integrity and a complete mockery of both process and law since:

i) In *Petition 568 of 2017, De La Rue & Anor vs. Central Bank of Kenya Limited*, the Petitioners therein had, in challenging the Tender, inter alia, contended that they had been unfairly excluded in the Tender process.

ii) That despite strenuously opposing the Petition on grounds that the Petitioners therein were neither affiliates of the 1st Petitioner herein nor qualified to print the new notes, the Procuring Agency nevertheless awarded the Tender to the 2nd Respondent on the same day the Petitioners therein withdrew the Petition.

iii) That to ensure that the playing field was tilted in favour of De La Rue International, the Bank at a very late stage in the Tender process introduced, as Addendum No. 3, a provision for partnering with local affiliates which allowed De La Rue International an advantageous, but underserved, rate of 15% over other bidders.

141. According to Crane AB, the CBK has consistently failed to adhere to *Article 227 of the Constitution of Kenya 2010* which provides that the tender process should be done in a manner that is fair, equitable, transparent, competitive and cost effective clearly shows lack of transparency and relied on the definition of "collusion" under the *Collins English Dictionary*, Third Edition, as:

A secret agreement for a fraudulent purpose, connivance, conspiracy. A secret agreement between opponents at a law in order to obtain a judicial decision for some wrongful or improper purpose.

142. Collusion has been further defined in the *Black's Law Dictionary*, Seventh Edition, as:

"An agreement to defraud another or to obtain something forbidden by law."

143. From the foregoing, it is obvious, according to Crane AB that the Bank and De La Rue International, are guilty of collusion with the sole purpose of defrauding both Crane AB from being awarded a tender that they emerged as successful and the Kenyan taxpayer. The Court was urged to shun such practices by procuring entities as it goes against the letter and spirit of Article 227 of the Constitution on the very important subject of public procurement.

144. It was averred that though the CBK confirmed that Crane AB is eminently qualified to print the new currency notes, however, notwithstanding an astronomical loss of Kshs. 800,000,000/-, it was still intent on awarding the Tender to an undeserving third party.

145. It was therefore submitted that **Crane AB** had demonstrated and made out an unassailable case for the dismissal, with costs, of both Judicial Review Applications by the Central Bank of Kenya and De La Rue International.

146. As regards its own case, Crane AB submitted that despite the findings of the Board, and the gist of the final decision, the Board, inexplicably, declined to grant the Tender No. CBK/37/2017-2018 to Crane AB as the best qualifying tenderer. This was contrary to the legitimate expectation of Crane AB and it is obvious that in doing so the Board failed to exercise powers donated to it under section 173 of the *Public Procurement and Asset Disposal Act, 2015*. Further, that the Board in doing so, unfairly subjected the Applicant to a fresh evaluation process, without any lawful justification. This is despite clear knowledge and awareness of the 1st Interested Party's capricious behaviour against the Applicant during the entire tendering process.

147. It was submitted that the Board had consistently held in its ruling of 8th January 2018, that pursuant to evaluation of the Applicant's tender documents, the Applicant was successful in the "preliminary and technical evaluation and had the lowest evaluated price" in the financial evaluation.

148. Crane AB therefore was of the view that the reasonable final order would therefore have been to substitute the Bank's award to the 2nd Interested Party with an unequivocal order directing the Bank to award the Tender to the Applicant. It lamented that the ruling by the Respondent to the extent that it did not award the Applicant the Tender No. CBK/37/2017-2018 was unreasonable and unfair. It placed the Applicant back in a position where it evident that the 1st Interested Party was biased and is unwilling to be bound by the provisions of the law and the Constitution.

149. It was averred that the Respondent having correctly concluded that there was bias and collusion between the Bank and the 2nd Interested Party, abused its discretion by making a decision that is unreasonable, irrational, unfair and in violation of the Applicant's legitimate

expectation.

150. According to Crane AB, the primary function of a Tribunal is to inquire into the matters complained of, looking as at the evidence as a whole and considering the nature of the dispute before it. Proceedings in such special Tribunals should not be expected to be similar to those in ordinary Courts of law who adhere to strict *Civil Procedure Rules* and in this respect it relied on **Hosea Mwangi Gachira vs Nephath Gachuhi Kimani [2002] eKLR.**

151. The 3rd Applicant submitted that where an issue was presented before the Board and the parties given a fair opportunity to respond, it cannot subsequently be argued that the Court cannot proceed to consider the issue merely because it was not properly pleaded. A similar issue arose in **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR.**

152. It was submitted that since the issue of the prayer that the award be made directly to Crane AB was substantively argued before the Board, it was therefore not an un-pleaded issue as contended by the Bank and De La Rue International and the Board should have addressed itself on the issue with a finding in favour of Crane AB as is being sought in the current proceedings.

153. According to Crane AB, having requested for an outright award of the Tender, the Board acted contrary to the discretion donated to it under section 173 of the Act and went against Crane AB's legitimate expectation.

154. In this regard the 3rd Applicant relied on **Republic versus Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd (2017) eKLR, Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** and **R vs. Devon County Council ex parte P Baker [1955] 1 All ER.**

155. Based on section 66(4) of the Act it was submitted that once a tenderer is successful in all evaluation stages and also submits the lowest evaluated price, it ought to be the successful tenderer and that this being an express provision of law, a contrary finding would be unfair, unreasonable and defies logic. In this regard the 3rd Applicant relied on **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR.**

156. To the 3rd Applicant, based on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240,** the Board in declining to properly exercise a power donated to it by the *Public Procurement and Disposal Act*, abused its power.

157. It was submitted that subjecting Crane AB to a fresh evaluation of the tenders by the Central Bank of Kenya will be subjecting it to a process that is not only unfair and but is also pre-determined. To them the expected collusion between the Bank and De La Rue International and the anticipated bias that **Crane AB** will be exposed to in the event of a fresh evaluation cannot be gainsaid. In adherence to both the letter and spirit of Article 227 of the Constitution, this Court ought to grant the Orders as sought since contrary to what is being contended by the Central Bank and De La Rue International this Court has the powers in law to grant an order for Mandamus as sought by Crane AB. In this regard it relied on **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** and **Republic vs. The Commissioner of Lands and Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012.**

Respondents Case

158. The three applications were however opposed by the Respondent Board.

159. According to the Board, on 19th December 2017, the 3rd ex parte applicant herein filed a Request for Review before the Respondent challenging the decision of the 1st ex-parte applicant in the matter of Tender No. CBK/37/2017-2018 for the Printing and Supply of New Design Kenya Currency Banknotes. After receiving the Request for Review from the 3rd applicant, the Respondent served a copy of the same on the 1st ex-parte applicant notifying it of the pending Review as required by section 168 of the *Public Procurement and Asset Disposal Act of 2015*.

160. It was averred that the Request for Review was subsequently heard wherein the Respondent considered the pleadings, affidavits, evaluation reports, the professional opinion, the original tender documents submitted by various bidders and all correspondence supplied to it by the procuring entity pursuant to the provisions of section 67 of the Act and Regulation 74(3) of the *Public Procurement and Disposal Regulations 2006* as well as the oral and written submissions of the parties and delivered its decision on 8th January 2018.

161. It was the Board's case that in determining the Request for Review by the 3rd applicant, the Board identified the following issues for determination namely:

- a. Whether or not the applicant has the locus standi to institute the present Request for Review under the provisions of section 167(1) of the Public Procurement and Asset Disposal Act.**
- b. Whether or not the Board has the jurisdiction to hear and determine the Request for Review on the ground that it was filed out of time contrary to the provisions of section 167(1) of the Public Procurement and Asset Disposal Act.**
- c. Whether or not the applicant contravened the provisions of section 167(2) of the Public Procurement and Asset Disposal Act by failing to pay the refundable deposit of 10% while filing the Request for Review.**

d. Whether or not the 1st Respondent, the Central Bank of Kenya is subject to the supervision of the Board and or the court while undertaking a procurement function.

e. In the event that the Board has the jurisdiction to hear and determine the Request for Review now before it, whether or not the 2nd Respondent was entitled to the benefit of the 15% margin of preference for the purposes of financial evaluation.

f. What orders should the Board make in the circumstances of this Request for Review.

162. According to the Board, its findings contained in the decision dated 8th January 2018 was within its powers as provided for in section 173 of the **Public Procurement and Asset Disposal Act, 2015**. It was its case that the applicants have not demonstrated that the Respondent was unreasonable in arriving at its decision or that it was guilty of unreasonable exercise of power and irrationality in arriving at its decision. To the contrary, the Respondent's decision was made within the law after review of all material placed before it and importantly in line with its mandate to uphold competitive and cost effective public procurement processes.

163. The Board averred that the applicants have not demonstrated that the Respondent in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the orders of the Respondent.

164. The Board took the view that the applicants herein are actually challenging the merits of the decision of the Respondent albeit disguised as a judicial review application which ought to challenge the procedure of arriving at a decision.

165. It was its position that the applications lack merit and should therefore be dismissed with costs to the Respondent.

166. In its submissions, the Respondent Board relied on the decision of the Court of Appeal in **Rentco East Africa Limited, Lan tech Africa Limited, Toshiba Corporation Consortium vs. Public Procurement Administrative Review Board & Another (NAI Civil Appeal 24 of 2017)**.

167. The Respondent submitted that in considering the application herein this Honourable Court ought to give a purposive interpretation to the values and principles set out in the Constitution and Procurement legislation as enunciated by the Court of Appeal. In its view, the Jurisdiction of the Court in judicial review has been more or less defined with reasonable certainty in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Republic vs. Chief Magistrate, Resident Magistrate's Court at Nairobi - Milimani Commerical Courts Ex-parte Safaricom Limited & 2 others [2014] eKLR and Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**.

168. The Respondent submitted that the present application arose from its decision made on 8th January 2018 in **Public Procurement Appeal Review Board Application No. 108 of 2017 Crane AB v. Central Bank of Kenya and others** and that the very same issues that were issue before the Respondent Board have been framed for determination before this Honourable Court so that what this Honourable Court is being called upon to do is reconsider the same and evaluate the merits of the Respondent Boards findings.

169. The Respondent submitted that to the extent that the Ex-parte Applicants are seeking a merits review of the decision of the Board this Honourable Court ought to decline jurisdiction and for that proposition the Respondent believes that authorities are legion some of which have been quoted above. In its view, a consideration of the decision of the Board would demonstrate that the Board acted rationally, legally and reviewed the Procuring entities decision mainly on the values and principles guiding Public Procurement as enunciated in both the Constitution and Procurement Statute. In this regard it relied on **Republic vs. The Public Procurement Review Board & Another ex-parte Hyosung Ebara Co. Ltd & Others (Nai CA No. 145 of 2011)**.

170. In response to the Ex-parte Applicants' submissions on the allegation that the Board acted *Ultra Vires* by allowing a party that was not a tenderer to file a request for review in breach of the provisions of sections 95(3) and 167(1) of the **Public Procurement and Asset Disposal Act** and that the Board acted *Ultra vires* by the provisions of section 167(1) of the **Public Procurement and Asset Disposal Act** by allowing a Request for Review that was filed out of the statutory period of 14 days, the Respondent submitted that the same could not be properly determined as a preliminary objection as it was fact dependent and that the Board after considering the same arrived at a rational decision. According to the Board, the Ex-parte applicant had based their argument on a letter dated 1st December, 2017 signed by one **Angelo Kok** appearing at page 117 of the Applicant's request for review. The Board perused the letter and noted that the said letter bore two names on top. The first name which appeared on the right hand side of the letter was that of Crane Currency albeit without an address while the name appearing on the left hand side of the same letter is Crane AB, it was therefore not entirely correct that the only name on the said letter was that of Crane Currency.

171. The Board further determined that in order to determine what entity or legal person had submitted a tender to the procuring entity, one had to look at the tender document and more particularly the form of tender in order to determine who the bidder is in a particular procurement process. It looked at the original tender document availed to the Board by the Procuring entity during the hearing of the request for review and more particularly the form of tender contained therein which was dated 8th November, 2017. The form of tender was signed by Angelo Kok on behalf of Crane AB. The name of Crane AB also appeared on the form of tender and its address was given as SE 14782 Tumba Sweden. There was no form of tender for Crane currency.

172. It was submitted that in a tender process a form of tender is fundamental and central to the process as it is the document in which a bidder makes its offer to the Procuring Entity which the Procuring Entity would then consider and either accept or reject. The Board therefore found that only a person who makes an offer to the Procuring Entity signified by the submission of a form of tender that can be considered as a bidder in the procurement process.

173. According to the Board, in the form of tender it was apparent that the tenderer was Crane AB and not Crane Currency as alleged.

174. It was submitted that since the Board had already held that Crane AB was the bidder and not Crane Currency and as the Board had already stated that the bidders address provided in the form of tender that was submitted to it by the Procuring entity was Crane AB, SE-14782 Tumba Sweden, T+46857869500, F+468857869800, Info@cranecurrency.com; www.cranecurrency.com. the Board looked at the letter of notification dated 30th November 2017 which appeared at page 00072 of the Ex-parte applicant's bundle of the memorandum of response and found that the said letter was dispatched to Regional Sales Director, Crane Currency, One Beacon Street, Boston MA 021018, USA. In its view, the two addresses were not the same. Under the provisions of section 87(3) of the **Public Procurement and Asset Disposal Act**, every Procuring Entity is under an obligation to specifically serve a letter of notification on the bidder who has participated in an procurement process and where that hasn't been done, the Board could not strike out a request for review on the ground that the same had been filed out of time. The Board looked at all letters of notification submitted to it by the Procuring entity and did not see any letter of notification addressed to the Applicant before the Board and found that the applicant who was a bidder in the procurement process hadn't been served with a letter of notification as required by the provisions of section 87(3) of the PPAD Act.

175. To the Board, the Ex-parte applicants' are essentially questioning the correctness of the Board's finding of facts, which cannot in any event be said to be irrational.

176. It was submitted that the Board considered the submissions made by all the parties before it on whether the successful bidder was entitled to the application of preference margin of 15% on its tender prices for lot 1 and lot 2 which resulted in a lower adjustment of its prices for lot 1 by a margin of USD 8, 007,450 and lot 2 by margin of USD 8,920,950 thereby making its tender the lowest evaluated tender for the two lots and found that section 155(1) of the **Public Procurement and Asset Disposal Act** places an obligation on all procuring entities to comply with its provisions on preferences and reservations while evaluating tenders. It Board considered the case of **Republic-vs- The Public Procurement and Administrative Review Board, National Industrial Training Authority and Coretech Solutions & Systems Limited Ex-parte Miscrohouse Technologies Ltd (Nairobi HC JR Misc. Appl. No.334 of 2015)** where the High Court held that, where the issue of a Procuring Entity's failure to apply the legal provisions on preference and reservations was raised before it, the Board was under an obligation to determine it, and in that case where the Board had not considered the same, the Court remitted the matter back to the Board for its reconsideration. The Board therefore had the mandate to inquire into the issue of preference. In so doing the Board looked at the tender document and particularly the **Clause 2.25.1** under section II- instructions to Tenderers-part of the tender document sections 155(2) and 155(2) of the **PPAD Act** and found that the margin of preference in the case was not applied on the basis of shareholding but on the basis of an allegation that the new currency would be produced in Kenya or where applicable assembled in Kenya. The Board found that to qualify for preference under the provisions of the act there was need to demonstrate that the successful bidder had in its own right had the capacity to manufacture, print, produce, or assemble the bank notes in Kenya as a bidder. The Board rightly held that the issue was an issue of evidence.

177. It was disclosed that the Board found that the successful bidder did not qualify for preference on account of the fact that De La Rue International Limited was a foreign company legally distinct from the De La Rue Currency and Security Print Limited and De La Rue Kenya EPZ Limited which fact was admitted by the two other local companies. The Board found that the criteria for granting the successful bidder preference as stated in the Procuring Entity's evaluation report from paragraph 31 was wrong i.e. that *De la rue international limited in their bid demonstrated that the goods to be supplied to the central bank of kenya will be produced printed and assembled locally in kenya through affiliates.*

178. It was submitted that the Board found that under section 155 of the PPAD Act, preference can only be granted to a bidder in its own right as a bidder if it can demonstrate that the manufactured articles, materials, and supplies are mined or are produced in Kenya or that they will be assembled in Kenya by the bidder but not by an affiliate. The successful bidder had admitted that it intended to subcontract the tender if successful to an affiliate. Further the Procuring Entity's purported preference on account of clause 3.15.1 of the tender document could not stand because the same could only come into effect once evaluation has been carried out, the tender awarded and only once a contract has been entered into. The Board correctly found that one could not subcontract before getting a contract in the first place. It is also important to note that there was no joint bid and the successful bidder ought to have been considered in on its own.

179. It was submitted that the Board found that a clause under the general conditions of contract in a tender document cannot be a tender evaluation criteria and cannot be used to grant a bidder preference and further a letter of intention to subcontract cannot entitle a bidder to preference since it's not only speculative in nature but is not binding on the bidder once it has been awarded a tender. And further if the successful bidder had intended to benefit from any preference scheme together with its affiliates/subcontractors it ought to have submitted a joint venture with them.

180. It was therefore submitted that the Board had jurisdiction to review the merits of the Procuring Entities decision to award preference to De La Rue International Limited and arrived at a rational decision on the same and based on **Republic vs. Kenya Power & Lighting Company Ltd & another [2013] eKLR**, and **Republic vs Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR** and contended that it is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice but that the actual sins of a tribunal must be exhibited for judicial review remedies to be granted.

181. The Respondent submitted that since issuance of judicial review orders is discretionary, in the present case it is not in dispute that the preference granted to De La Rue International Limited which was clearly outside the law would occasion the tax payer a difference of USD 8,007,450 for lot A and USD 8,920,950 for Lot B approximately 1.8 Billion Kshs which was reduced from the Ex-parte applicants financial bid but must be paid if the Procuring Entity's award is to be upheld. In the Circumstances the Respondent urges the Court submits that this is a proper case for decline of exercise of favourable discretion to the ex-parte applicant.

Determinations

182. I have considered the Notice of Motions, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

183. As I indicated at the beginning of this judgment, by an application dated 9th March, 2018, the 3rd Applicant herein, **Crane AB**, sought to have its JR Misc. Application No. 18 of 2018, **Crane AB vs. Public Procurement Administrative Review Board & Others** marked as withdrawn and further that the 3rd Applicant be deemed as not opposing the prayers sought in the 1st and 2nd Applicants' applications save for costs.

184. The basis for the said application was that the 3rd applicant no longer wished to pursue its said application. However, the other parties had not responded to its request to have the said application resolved amicably and by consent.

185. The application was however opposed by the 1st Applicant, through its learned counsel, **Mr. Ochieng Oduol**, who submitted that the 3rd Applicant had made serious allegations against the Board of the CBK and a decision was made thereon and the same still stood. It was submitted that the same cannot be withdrawn since in these proceedings, what is being challenged is the process which was both constitutional and statutory.

186. It was submitted that the exercise of discretion must be looked at both ways. Learned counsel urged the Court to disallow the application and subject the issues raised herein to a judicial process so that the process is not clouded by suspicion. In his view the conduct of the 3rd Applicant amounted to an abuse of the Court process and the Court should invoke its inherent power and stop it. In any event, the 1st Applicant insisted on costs.

187. The 2nd Applicant, **De La Rue International Limited**, also opposed the application to withdraw the 3rd Applicant's application, through its learned counsel, **Mr. Ngatia**. According to him, the said application was consolidated with the other applications and heard as one matter and there was no request that the order of consolidation be set aside. Secondly no reason was advanced as the basis for the withdrawal, post the hearing, apart from the allegations of instructions which is not sufficient.

188. It was argued that the Court in this matter is dealing with a matter governed by the Constitution as opposed to one of commerce and trade hence there is constitutional and public interest involved. In support of his submissions learned counsel relied on **Peter Makau Musyoka & 19 Others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) vs. Permanent Secretary Ministry of Energy & 14 Others [2014] eKLR**. Though in that matter the Court allowed the parties who wished to withdraw to cease being parties without the matter being withdrawn, in this case it was submitted that the matter had been heard awaiting judgement hence it is not permissible for one to cease being a party more so as allegations had been made which are conjoined with the other parties' allegations.

189. It was submitted that in applications for judicial review orders cannot be made by consent since they are in the realm of public law. Therefore whether the 3rd applicant is opposing the matter or not is irrelevant as the orders sought are against the Board.

190. The application was similarly opposed by the Respondent. According to **Mr. Bitta**, learned counsel for the Respondent, the matters in issue are matters touching on procurement of the new currency, hence matters of great public importance since they involve constitutional and statutory principles that determine how the process is to be undertaken. It was his view that his client, the Board relies on the Court to clarify the process.

191. In this case it was submitted that whereas the 3rd applicant filed both supporting and replying affidavits, it had not sought to withdraw any. Neither has it sought to withdraw the submissions it made which were responded to. While the 3rd Applicant, seeks to withdraw the application, it was noted that it had not said that the facts it deposed to are false yet the same have been brought to the attention of the Court.

192. It was submitted that it is legally impossible at this stage for the 3rd Applicant to be deemed as not opposing the application by the other applicants. Accordingly the Court was urged to dismiss the application for withdrawal and to proceed and deliver its decision.

193. Similarly, the interested parties through their learned counsel, **Mr. Njogu**, opposed the application. According to him, given the fact that the hearing of the matter has been concluded and there is no other positive step required of the parties pending the issuance of the judgement, the application is forcing other parties to incur costs. It was further submitted that the intertwined nature of the petition and the judicial review applications means that it is practically and legally impossible and untenable to separate the same especially as no reason has been given to warrant the said withdrawal.

194. I have considered the submissions of counsel on behalf of their respective clients.

195. In ordinary civil litigation, a party is at liberty at any time before final judgement to withdraw his suit. However the matter before me is not a civil suit but is a judicial review application. This Court has had occasion to deal with the compromise by parties of such matters in Nairobi (Milimani) High Court Judicial Review Division Miscellaneous Application No. 116 of 2016 Consolidated with Miscellaneous Application No. 119 of 2016 – **Republic vs. The Public Procurement Administrative Review Board**, where it held *inter alia* as follows:

***“In my view, in judicial review and any public law litigation, at that, parties cannot, without the endorsement of the Court, compromise the proceedings. Further, once parties have been joined thereto, it is not open for some of them to compromise the proceedings in a way that prejudices the interests of the other parties, however nominal they may seem to be to the parties compromising the suit. In other words, once the Court or the parties themselves recognise that there are persons interested in the proceedings, any compromise thereof as opposed to the withdrawal of the proceedings by the applicant ought not to be permitted unless it is clear that the issues in the judicial review proceedings can be said to be divisible and the compromise only affects the part of the suit which does not affect the interests of the persons not consenting. In this case, I have found that the 2nd interested party stands to benefit if these proceedings are determined in favour of the applicant. In other words the 2nd interested party's interests are intertwined with and not divisible from those of the Procuring Entity hence the latter cannot by a stroke of the pen and in collusion with the other persons take steps whose effect would be to obliterate the 2nd interested party's interests more so*”**

where it is contended, as in this case that the effect of the compromise would be to render the Constitutional and statutory provisions guiding public procurement irrelevant.”

196. In arriving at the said decision the Court extensively relied on **Republic vs. Registrar of Societies ex-Parte Justus Nyangaya & 3 Others [2005] eKLR** where a consent was recorded in judicial review in which there was an applicant, respondent and interested party. In setting aside the consent recorded by the Deputy Registrar therein, Nyamu, J (as he then was) expressed himself as follows:

“The applicants claim that the original applicants are aware of the fact that the applicants had become parties firstly because they were served with the orders enjoining them and secondly through Boro Gathuo they had filed a replying affidavit on 5th November, 2002. In para 3 and the whole of the affidavit there is a clear acknowledgement that the IPs were interested parties and were part of the proceedings. Similarly the Registrar General by an affidavit sworn by Ms Catherine Nyiha, a Senior Assistant Registrar of Societies on 17th December, 2003 did respond to the IPs application and she too had knowledge of the IPs and the fact that they were part of the proceedings. Both affidavits it is contended show that at all times the original applicants and the respondent were aware that the IPs were contesting the proceedings. On 29th October 2003 a consent letter was filed in court. The consent letter was dated 25th October, 2003. Although the consent letter was signed by the original applicants and the respondent it was not signed by the IPs. It was also not shown to the IPs. I have considered the positions taken by all the parties as outlined above including the submissions of counsel together with the written skeleton arguments. The court after a careful scrutiny of the reasons given by the applicants counsel in his lengthy arguments number 1 to 22 as outlined above has been sufficiently persuaded that the reasons given in support of the arguments are convincing. On the other hand the brief arguments advanced by the counsel for the original applicants and the respondent in support of the consent order are off the mark in terms of the applicable law and are also factually incorrect. Firstly the changes effected pursuant to the consent order were the ones the applicants were opposed to and were entitled to a hearing and determination. Secondly once proceedings in the nature of Judicial review are filed it is not the parties who give relief but the court.”

197. The Learned Judge then proceeded to deal with the parties to judicial review proceedings and their respective roles and expressed the opinion that:

“It is significant to consider who are the parties to a Judicial review application. One of the situations is where there is an applicant or applicants and a respondent or respondents. The second situation is where there is an applicant or applicants, a respondent or respondents and an interested party or parties. The facts of this particular case fit the second category. It is common ground that there were interested parties in this case. It was therefore necessary for both the court and all the other parties at all times to recognize their presence until the determination of the matter in question. The position as outlined has the authoritative support of *THE WHITE BOOK VOL 2002 at page 152* as cited by the learned counsel for the applicants Mr Pherojee Nowrojee. The relevant portion 54.1.13 reads:

‘The parties to a Judicial review claim will be the claimant, the defendant and interested parties. The defendant will usually be the public body whose decision, action or failure to act is under challenge. An ‘interested party’ is defined in rule 54 1(1) (f) as any person ‘who is directly affected by the claim.’ Under the former RSC Order 53 r 5(3) application for Judicial review had to be served on persons “directly affected.’

In the Kenyan context it is Order 53 rules 3 and 4 which requires service on persons directly affected. I therefore find that the Kenyan situation on parties to be similar to the current situation in the United Kingdom notwithstanding the repeal of their O 53 by the new O 54.”

198. The learned Judge then accordingly dealt with the matter in the following manner:

“Since it is common ground that the IPs were not parties to the consent letter and order and yet they were affected parties how does this affect the consent letter and order...On this I find that in the circumstances of the case before me since the IPs were parties to the proceedings in law and they were deliberately excluded from the consent letter/order or judgment the very act of excluding them is a fraudulent act taking into account that the exclusion was clearly aimed at conferring benefits to the excluding parties and denying the IPs of the same benefits. Similarly the exclusion of the IPs if not done fraudulently does in the circumstances constitute negligent misrepresentation to say the least and an unforgivable mistake as well...The oversight on the part of the Deputy Registrar was either deliberate, negligent or by mistake and all these lapses entitle the aggrieved party to avoid the consent order. Lord Herschell in the celebrated case on misrepresentation *DERRY v PEEK 1889 14 AC 389* said “if a representor deliberately shuts his eyes to the facts or purposely abstains from their investigation, his belief is not honest and he is just as liable as if he had knowingly stated a falsehood”

199. In the Court’s view:

“Neither the Registrar of societies nor the Deputy Registrar can oust the Court’s jurisdiction to determine matters referred to it. When the application for leave was filed on 27th September, 2002 and leave granted it was granted on the strength of the statement filed on the same day and the relief sought... However the consent recorded and in particular orders (a) (b) and (c) are completely outside the ambit of the relief sought. Thus the orders are not in the nature of mandamus directed at the registrar of Societies. The orders are not in the nature of mandamus at all and are therefore outside the scope of Judicial review remedies at all or as claimed in the proceedings the consent order was purporting to settle. The orders disregarded the IPs who were part of the proceedings and literally took away offices from them without any determination by a Judicial review court. It is not possible in law for a consent order or letter to confer Jurisdiction on the Deputy Registrar where it is not specifically conferred on him. In other words

jurisdiction cannot be conferred by consent. It is trite law that jurisdiction to grant Judicial review remedies is vested in the court (Judges), and they cannot delegate the power to grant those remedies to a Deputy Registrar or any other person this being a supervisory jurisdiction specifically conferred on them by statute – see *HALSBURY'S LAWS OF ENGLAND 3rd Edition vol II page 119 and para 222*:

‘Parties cannot by agreement or otherwise confer jurisdiction upon or oust the jurisdiction of a court’.”

Surely the effect of the consent judgment or order was to oust the jurisdiction of the court by virtue of an agreement by some of the parties to make the matter worse. Even if all the parties had agreed to oust the court’s jurisdiction I find and hold that they could not do so. The said consent judgment/order is null and void for this reason as well.”

200. According to the Court:

“a party or parties cannot seek relief that is outside the statement unless leave to amend the statement is sought and granted pursuant to O 53 rule 4(2) and no such amendment or leave was sought in this case. It follows that the consent judgment or order flies in the face of O 53 rule 4(1) of the Civil Procedure Rules which is worded in mandatory terms. The consent is not valid for this reason as well.”

201. It was further held that:

“It is clear from the facts outlined above that the original applicants counsel kept away from the court material facts concerning the settlement which had been worked on behind the IPs back on 29th September, 2003... Since the IPs were parties to the proceedings and were deliberately kept out of the consent judgment or order by the other parties, the effect of this must be the same as that of a party to a contract which he is entitled to rescind and once he challenges such a consent judgment/order in court for keeping him away the effect must be to restore the parties position to that prevailing before the consent was entered into – parties in status quo ante. Lord Atkinson in the case of *ABRAM STEAMSHIP COMPANY v WESTVILLE SHIPPING COMPALY LTD [1923] AC 773 at 781* described the effect in the following terms:

“Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it the expression of his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things as between them, to the position in which they stood before the contract was entered into.”

I therefore hold that this court views the position of IPs in electing to apply to set aside the consent judgment in the same light. They have elected not to be bound by it although the consent judgment purports to bind them and consequently this court is obligated to set the consent judgment/order aside in order to restore all the parties to the position they stood before the consent judgment/order was entered into. It does not matter to the court whether the acts leading to the entering of the consent constitute mistake, fraud or misrepresentation, justice demands that the previous position be restored...I also accept as good law that where some of the parties such as in this case fail to make a full disclosure to the court and obtain what for all practical purposes is an ex parte order behind the back of bona fide parties to the proceedings such as the IPs the court has jurisdiction to refuse such an application if asked for ex-parte or obtained ex parte, in violation of the duty *uberrimae fidei* to make full disclosure to court.”

202. I appreciate that what is before me is not an attempt to record a consent but an attempt by one of the parties, to a consolidated cause, to withdraw its claim. The matter before me is a public law matter. However the distinction between what is public law and what is private law is not always easy to make. This was appreciated by **Hancox, JA** (as he then was) in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194** where he held that the expressions “public law” and “private law” are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies.

203. That said, in **Destro and Others vs. Attorney General [1980] KLR 77; [1976-80] 1 KLR 1590**, **Simpson, J** (as he then was) expressed himself as follows:

“In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words no estoppel can legitimate an action, which is *ultra vires*... Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made since the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again the principle of *ultra vires* must prevail when it comes into conflict with the ordinary rule of law.”

204. In this case three applications were consolidated. It is therefore clear that in such cases, the consolidated suits became one and only one decision is possible. Whereas a party is at liberty to withdraw its claim, it is his claim and his claim alone that can be withdrawn. The substance of the suit however remains intact and must proceed to determination. That is my understanding of the decision in **Peter Makau Musyoka & 19 Others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) vs. Permanent Secretary Ministry of Energy & 14 Others [2014] eKLR** at paras 24 and 25 where it was held that:

“24. The considerations which a court should take into account when asked to permit a petitioner in a Public Interest Litigation to withdraw were succinctly expressed by the Supreme Court in the Indian Case of *S.P. Anand v H.D. Deve Gowda*

(1996) 6SCC 734 thus:

‘Here we must mention that in PIL cases, the petitioner is not entitled to withdraw his petition at his sweet-will unless the court sees reason to permit withdrawal. In granting the permission the Court would be guided by considerations of public interest and would also ensure that it does not result in abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of the court to their advantage and then seeking withdrawal of the case. There are umpteen ways in which the process can be abused and the courts must be aware of the same before permitting withdrawal of the petition.’

25. It is clear that our Rule 27(3) cited above is a crystallization of the reasoning in this case, which we now adopt. The test requires a court to only permit a withdrawal of a Petition where the court is satisfied that the juridical effects of the withdrawal will not be adverse to the public interest or the interests of any individuals involved. Differently put, the test is simply that a court will only permit a petitioner to withdraw a Public Interest Litigation matter upon being satisfied that none of the following conditions, which our Rules call “juridical effects”, are present:

a. That the public interest initially presented in the case will not suffer as a result of the withdrawal. Differently put, the question to ask here is whether the public interest concerns which were to be addressed in the case will suffer adverse effects resulting from the withdrawal of the suit. If the public interest would be compromised or diminished in any way or if the withdrawal of the suit would make it strategically, technically or procedurally more arduous to establish, articulate or consider the public considerations in the case, it follows that public considerations would counsel against leave to withdraw the petition.

b. That there is no abuse of the process of the law. Here the court will look to see if the party seeking to withdraw acted in good faith both at the time of filing the suit and at the time she seeks to withdraw. In particular, acutely conscious of the role of Public Interest Litigation, the Court will test to see if there is any inkling that the party seeking to withdraw does so in order to personally benefit from the case, or its publicity. This is to ensure that, in the words of the Supreme Court of India in *Sheela Barse v Union of India AIR 1988 SC 2211* and cited to us by Mr. Waikwa, “a person or body of persons cannot approach the Court with ulterior motive or design to wrench some personal benefit by putting another within the clutches of law and using the court for a device only to that end but not interested with the result of the petition.”

c. That the case at hand is not an exercise in futility. If the case has been overtaken by events or the points pressed by the petitioners are moot, it would be absurd to insist that the case proceeds even if initially it was dripping with public interest.

205. In that case the Court appreciated that the issues canvassed in the Petition raised substantial questions of law under the Constitution; were matters of immense public interest and importance and that there would be adverse juridical effects on the public interest if the application to withdraw was permitted since the suit would be rendered narrower with the withdrawal of the petition sought to be withdrawn and therefore would compromise or diminish in some non-trivial way the ability of the parties to establish, articulate or consider the public considerations in the case.

206. In this case it is also clear that the issues the subject of this consolidated cause are matters raising substantial questions of law under the Constitution since the procurement in question is being undertaken in order to fulfil the dictates of the Constitution and therefore both Articles 227 and 231(4) of the Constitution are being invoked. Serious issues have been raised by the parties to this suit which require determination. Affidavits have been sworn and submissions made in support of each parties’ case. Those sworn depositions are part of the record and have not been sought to be expunged from the record. Being public law litigation the Court cannot simply ignore the same.

207. However the Court cannot force a party who sought specific prayers in a cause to have the orders if the party is no longer interested in the same. It would be ridiculous for this Court for example to direct that the subject procurement be awarded to the 3rd applicant when the 3rd applicant has already intimated that it is no longer interested in the tender. I therefore agree with the position adopted by the Court in **Peter Makau Musyoka & 19 Others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) vs. Permanent Secretary Ministry of Energy & 14 Others** (supra) when it held that:

“We are, however, persuaded that there is a distinction between withdrawing Petition 305 of 2012 and permitting the individual Petitioners in that Petition to withdraw their further participation in the Consolidated Petition. It would be unfair and foolhardy to compel un-interested Petitioners to persist in a Constitutional Petition they have lost interest in or one they feel their grievances have already been adequately addressed. We will therefore follow the cue provided by the persuasive authority in the *Sheela Barse Case* (cited above) and permit that the individual Petitioners in 305 of 2012 be permitted to individually withdraw from the Consolidated Petition and that their names be deleted from the Consolidated Petition for purposes of future proceedings.”

208. Similarly in this case, there is a distinction between the withdrawal of proceedings by one party to a consolidated suit and the withdrawal of his claim. Whereas the former is only acceptable in exceptional circumstances particularly in public law litigation, the latter is acceptable.

209. In the premises whereas I decline to allow the 3rd applicant’s application to be withdrawn, I allow its prayers to be withdrawn. As regards costs, I agree that there is no compelling reason given why the 3rd applicant did not withdraw its claim in good time instead of waiting when the matter was pending delivery of judgement to do so. In the premises the costs of the 3rd Applicant’s application are awarded to the 1st and 2nd applicants, the Respondent and the interested parties to be borne by the 3rd Applicant, **Crane AB**.

210. I will then proceed to deal with the rest of the issues.

211. I agree that broadly the issues which fall for determination are as follows:

- 1) Allowing a party that was not a tenderer to file a request for review in breach of the provisions of sections 95(3) and 167(1) of the Public Procurement and Asset Disposal Act.**
- 2) The Respondent acted contrary to the provisions of section 167(1) of the Public Procurement and Asset Disposal Act by allowing a Request for Review that was filed out of the statutory period of 14 days.**
- 3) The Respondent by its decision of 8th January 2018 acted ultra vires the provisions of section 155 and 157 of the Public Procurement and Asset Disposal Act 2015.**
- 4) Whether the Respondent in rendering the judgement of 8th January 2018 acted illegally and irrationally by directing the 1st Applicant to re-evaluate the tender of all parties that put in tenders including the 3rd Applicant who was not prequalified and not entitled to participate in the tender in question and or file a request for review with the Respondent.**
- 5) Whether the Respondent has powers to disregard express provisions of the law as well as the Restricted Tender documents while determining the said request for review filed by the 3rd Applicant.**
- 6) And by finally addressing the question on how should this Honourable Court exercise its discretion?**

212. It was averred that the 3rd ex parte applicant herein, **Crane AB**, was not one of the prequalified bidders. At the time of prequalification of bidders in the year 2014, the bidders were required to fill in a confidential questionnaire and provide information including particulars of each bidder and, pursuant thereto, **Crane Currency** filled in the questionnaire. It was however reiterated that in the said application the Applicant to be prequalified was **Crane Currency** and it neither indicated that it was a consortium nor that it was a joint venture.

213. It is not in doubt that tender No CBK/037/2017-2018 was restricted to prequalified bidders. Section 95 of the **Public Procurement and Asset Disposal Act** provides as follows:

(1) The evaluation committee shall, in writing record the results of the evaluation of applications for pre-qualification using the evaluation criteria in the qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The record of results prepared under subsection (1) shall be submitted with recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.

(3) A procuring entity shall invite tenders from only the approved persons who have been prequalified.

214. It is therefore clear that the only entities that could qualify for invitation to tender for the subject Tender were those that had been pre-qualified to do so. In other words without one being prequalified it had no business participating in the subsequent process. In this case it is clear that there were only four prequalified bidders; **Crane Currency, Giesecke and DevrientGmbH, De La Rue International** and **Oberthur Fiduciare. Crane AB** was not one the entities that were prequalified and it is not in doubt that **Crane Currency** and **Crane AB** are separate and distinct legal entities. In this case however, the Applicant is **Crane AB** which is a separate entity from **Crane Currency**. It is not challenged that **Crane AB**, the 3rd applicant never applied to be prequalified.

215. Section 167(1) of the **Public Procurement and Asset Disposal Act** provides as follows:

Subject to the provisions of this Part 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 in such manner as may be described.

216. It therefore follows that the only parties who have *locus* before the Respondent Board to challenge an award or alleged breach on the part of a procuring entity are a candidate or a tenderer. The terms “candidate” and “tenderer” are defined in section 2 of the Act as follows:

“..candidate” means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity..” ; and

“tenderer” means a person who submitted a tender pursuant to an invitation by a public entity”

217. Therefore for one to be a candidate or tenderer it must be a person who has obtained the tender document from the public entity or who has submitted a tender and in both cases, the person making the challenge must have received an invitation from the procuring entity. As stated in section 95(3) of the Act, the invitation in restricted tenders of this nature is only sent to those who have been successfully prequalified. In this case **Crane AB** was not successfully prequalified. Whereas it may well have come into possession of the tender documents, it did not do so vide an invitation from the 1st Applicant. It follows that **Crane AB**, the 3rd applicant was not a tenderer within the meaning of section 167(1) of the **Public Procurement and Asset Disposal Act**. That this was appreciated by the 3rd Applicant comes clearly from the letter dated 1st December 2017 in response to the notification of award in which the 3rd Applicant states that “**on the**

opening of the tenders on 22nd November 2017 it was clear that CRANE CURRENCY had submitted the lowest bid". It is therefore clear that in entertaining the request for review by the 3rd Applicant herein, the Respondent made an error of precedent fact which is a fundamental factual error or a finding devoid of evidence. That is a sufficient ground to grant the application since that error deprived the Respondent of the jurisdiction to entertain the request for review.

218. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479 held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

219. In this case the decision by the Respondent amounted to an illegality since it failed to adhere and observe substantive provisions expressly laid down in the statute by which it exercises jurisdiction to make a decision. It failed to adhere to the provisions of section 167 of the **Public Procurement and Disposal and Asset Disposal Act of 2015**. In **Miscellaneous Application No 540 of 2008 - R vs. Public Procurement Administrative Review Board & Kenya Revenue Authority**, the Court held that:

"A fundamental misdirection or failure to address the applicable law or a fundamental error of law in reaching a decision does render the decision reached by a decision maker devoid of legality and therefore void. By failing to respect clear statutory and mandatory provisions the Respondents were *ultra vires* both Section...."

220. It is clear that in arriving at its decision the Respondent laid more emphasis on the form of tender but failed to consider the requirement for prequalification. Whereas the form of tender was important, the Respondent was under an obligation to consider all the relevant matters in arriving at its decision. As was held in **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55**:

"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute"

221. The Respondent therefore erred in failing to take into account the fact that the 3rd Applicant was not prequalified.

222. It was contended that the Respondent further ignored that the Request for Review had been filed out of time contrary to the mandatory statutory period and in turn acted in excess of its jurisdiction and in breach of section 167(1) of the **Public Procurement and Asset Disposal Act 2015**. In this case it is not controverted that the decision awarding the tender in question was made on 30th November 2017. While there is a contest as to when the said decision was transmitted to the 3rd Applicant, it is clear that there was a response by the 3rd Applicant on the same date at 11.24 am followed by a formal letter on the following date 1st December 2017. Surely the 3rd Applicant could not have been responding to a communication which it had not received. While it may well be that the communication was not addressed to the 3rd Applicant, it is not in doubt that it did somehow receive the same by latest 1st December, 2017. Therefore the last date for the filing of the Request ought to have been 15th December, 2017. The Request was however filed on 19th December, 2017 which was clearly out of time. In **Judicial Review Case No. 21 Of 2015 - Republic vs. Public Procurement Administrative Review Board & Centre for Mathematics, Science and Technology in Africa & 2 Others Ex parte Apex Security Services Limited Misc Application No 21 of 2015**, it was held that:

"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days...The timelines in the PP&DA were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned."

223. The Respondent's reason for allowing the Request was that the 1st Applicant failed to comply with section 87(3) of the Act which provides as follows:

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.

224. In other words the Respondent was of the view that the 3rd Applicant had not been notified of the award at all. If that position was correct then it would follow that the right to apply for administrative review had not accrued to the 3rd Applicant. The 1st Applicant's position was that a letter was issued to **Crane Currency**, which, according to it, was the bidder informing it that it was not successful. There is no contention that any communication was sent to the 3rd Applicant though it would seem that it somehow got wind of the communication by latest 1st December, 2017.

225. It is clear that under the said provision, it is trite that a challenge by way of administrative review can only be taken 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 in such manner as may be described. Therefore if the 3rd Applicant was not notified, could it competently move the Board? In **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 others Miscellaneous Application 250 of 2015**, this Court expressed itself as hereunder:

“Therefore even if the Court was to find that the letter dated 30th April, 2015 did not constitute a valid notification under the Act for the purposes of the Request for Review, the fact that there is no evidence that the letter dated 8th June, 2015 complied with Regulation 73(2)(c)(ii) of the Regulations with respect to notification to both the successful and unsuccessful parties at the same would have rendered the Request purportedly made pursuant thereto premature and hence the Respondent would similarly have lacked the jurisdiction to entertain the Request.”

226. Therefore whether the matter is looked at from the point of view that the 3rd Applicant was notified or that it was not notified, the Respondent erred in entertaining the Request as it lacked the jurisdiction to do so. If the 3rd Applicant was not a tenderer, and I have found so, it had no business being notified of the award. Worse still it had no business making a Request for Review of an award in which it was not lawfully a tenderer.

227. As regards the powers of the Board, the current position is captured in the holding in **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte Kenya Power and Lighting Company Limited [2017] eKLR** where the court stated as follows:

“This issue calls for an interrogation of the role and powers of the Review Board when determining a request for review. The powers of the Board when exercising its jurisdiction are prescribed in section 173...Under the repealed *Public Procurement and Disposal Act*, section 98 conferred wide powers to the Respondent including annulling anything done by the Procuring Entity in the procurement proceedings, or indeed annulling the procurement proceedings in their entirety; giving directions to the Procuring Entity with respect to anything to be done or redone; or substituting its decision for any decision of the Procuring Entity. It is however clear that under the current legislative framework, the powers of the Review Board with respect to substitution of the decision arising from a procurement process is restricted to decisions of the Accounting Officers of the Procuring Entity as opposed to the decisions of the Procuring Entity itself or the Evaluation Committee. The powers of the Accounting Officer in terms of entry into a contract are to be found in section 135 which provides *inter alia* as hereunder:

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.

(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.

The powers to deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it are however reserved to the Evaluation Committee set under section 46(4)(a).

In fact section 85 of the Act expressly provides that:

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

In my view this demarcation of the roles between the Evaluation Committee and the Accounting Officer is important for the purposes of achieving transparency as decreed in Article 227 of the Constitution. It is however clear that the role of the Accounting Officer is to implement the decision of the Evaluation Committee since section 135(5) of the Act expressly bars the Accounting Officer from entering into a contract with any person or firm unless an award has been made.

It is therefore clear that the powers of substitution given to the Review Board are now restricted to the decision of the Accounting Officer. Since Parliament saw it fit to restrict the powers of the Review Board, the Review Board can only exercise such powers as restricted by Parliament. This Court in Republic vs. Public Procurement Administrative Review Board & 2 Others Team Engineering Spa [2014] eKLR expressed itself as hereunder:

“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.”

It is trite that a judicial or quasi-judicial tribunal, such as the Board herein has no inherent powers. See Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734. In Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J (as he then was) was of the view that powers must be expressly conferred and cannot be a matter of implication. It was in appreciation of the foregoing position that the Court in Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981 held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530 it was held that the general principle remains however, that 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. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies.”

228. I therefore agree that the sum effect of this interpretation is to limit the orders which the Board can give in a Request for Review to strictly those that are expressly provided for under section 173 of the Act which does not extend the procuring entity's powers to annulling the decision of the procuring entity and or its evaluation committee.

229. I however disagree with the position adopted by the interested parties that the 1st Ex-parte Applicant being a creation of the Constitution of Kenya 2010 (“the Constitution”) pursuant to Article 231(3) of the Constitution, in the performance of its functions, the Respondent has no jurisdiction over it when undertaking the functions pursuant to Article 231(3) of the Constitution. To make such a finding would amount to rendering the provisions of Article 227 of the Constitution redundant, and this Court cannot do that. Adopting a purposive approach the correct position must be that whenever the 1st Applicant is carrying out public procurement, it is bound by Article 227 of the Constitution and the legislative instruments enacted pursuant to the said Article just like any other public entity. If Article 227 subjects the 1st Applicant to procurement procedures then it is a subjection imposed by the Constitution itself and the 1st Applicant must bow to it.

230. In this respect I associate myself with the decision of the Supreme Court in In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR at paragraph 59 where it held that independence is not a *carte blanche* for entities to conduct themselves on whim; but that their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.

231. The 3rd Respondent raised the issue that the manner in which service was effected rendered these proceedings incompetent pursuant to Order 5 Rules 22 and 29 (h) of the *Civil Procedure Rules*.

232. In matters where public law is involved, it is my view that the Court ought to avoid decisions which elevate technical rules of procedure at the expense of substantive justice. In such cases once it is shown that the existence of legal proceedings have been sufficiently brought to the attention of the parties and no prejudice has been occasioned, the proceedings ought to be sustained.

233. In any case, in Roberta Macclendon Fonville versus James Otis Kelly & 3 Others (2002) eKLR, it was held that:

“A foreign defendant who has been served with a notice of summons had a right to contest the jurisdiction of the court by entering a conditional appearance and thereafter applying to set aside the order giving leave or to strike out the suit for want of prosecution, even though there were no specific rules to this effect (Nanjibhi Prabhudas and Co v. Standard Bank (1968)

EA 896 followed.”

234. Suffice it to say that the 3rd Applicant did not make any such application in these proceedings.

235. Having considered the issues raised before me in these proceedings, the inescapable conclusion I come to is that the applications by the 1st and 2nd Applicants is merited. The Respondent simply lacked the jurisdiction to entertain the Request for Review and ought to have downed its tools.

236. I have refrained from dealing with the issue of preference in these proceedings in light of my finding that the Respondent had no jurisdiction to entertain the request, and secondly as the matter of preference is dealt with in Petition 597 of 2017 which arose from the same tender.

Order

237. Consequently, an order of certiorari is hereby issued bringing into this Court for the purposes of quashing and quashing the Respondent's decision dated 8th January 2018 in **PPARB No 108 of 2017 between Crane AB and Central Bank of Kenya, De La Rue International Limited, De La Rue Currency & Security Print Limited and De La Rue Kenya EPZ Limited.**

238. Save for the costs of the 3rd Applicant's application which I have awarded elsewhere in this judgement, there will be no order as to costs in respect of the 1st and 2nd Applicant's applications considering the public interest involved.

239. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 9th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: