



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 50 OF 2017

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF: THE DECISION MADE BY THE KENYA PORTS AUTHORITY DATED 9TH AUGUST, 2017 TO MAKE AWARDS IN RESPECT TO TENDER NO. KPA/114/2016-17/ADM

AND

IN THE MATTER OF: THE SAID DECISION BY THE KENYA PORTS AUTHORITY FAILING TO ADHERE TO THE PRINCIPLE OF TRANSPARENCY, ACCOUNTABILITY AND CREDIBILITY AS REQUIRED BY ARTICLES 10, 47, 201 AND 227 OF THE CONSTITUTION OF KENYA, 2010 AND ALSO THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT, 2015

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 88 OF THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT, 2015

BETWEEN

HIGAWA ENTERPRISES LIMITED.....APPLICANT

VERSUS

1. KENYA PORTS AUTHORITY

2. YOBESH OYARO.....RESPONDENTS

AND

1. AUTOMIC ENTERPRISES

2. JASY SOLUTIONS

3. BOKOLA TRADING

4. SINBAD PROJECTS LIMITED

5. ROYALNIC CLEANERS LTD.....INTERESTED PARTIES

RULING

The Application

1. Pursuant to the leave granted by court on 22nd September, 2017 the, the Applicant herein filed the Notice of Motion dated 26th September, 2017 which prays for the following orders.

(a) That an order of certiorari be issued to quash the decision made on 9th August, 2017 by the Respondent to make awards in respect of Tender No. KPA/114/2016-17/ADM. For the avoidance of any doubt, the Respondents be directed to undertake a fresh tendering process in the said tender.

(b) That the grant of leave to apply for the Judicial Review orders sought herein do operate as a stay against the Respondents, their agents and servants from executing any contracts with respect to Tender No. KPA/114/2016-17/ADM.

(c) That the costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by Verifying Affidavit sworn by Simon Gachemi on 19th September, 2017 in support of the Chamber Summons for leave herein dated 19th September, 2017.

3. The Applicant's case is that sometime in March, 2017 the Respondent invited interested persons to bid for Tender No. KPA/114/2016-17/ADM for the provision of housekeeping services (preference group). The Applicant was one of the bidders. The Respondent requested all the Tenders to submit their bids before 00900 Hours on the 4th April, 2017 whereafter the Tenders were opened. The validity period for the said tender was 90 days starting from the 4th April, 2017. Indeed, Section 17. 1 of the tender document provided that, "*The tender validity period shall be [90] days after the deadline for Tender submission specified in the Tender data sheet*". As such, the Applicant states that the tender validity period in respect of Tender No. KPA/114/2016-17/ADM lapsed on 4th July, 2017. However, on 11th July, 2017 the Respondents issued a notice indicating that the tender validity had been extended by further 30 days effective from 16th July, 2017. Bearing in mind that the tender validity had lapsed on the **4th July, 2017**, the Applicant states that Tender No. KPA/114/2016-17/ADM floated by the Respondents was not in existence after the 4th July, 2017. The Applicant further states that Section 88 (1) of the Public Procurement and Assets Disposal Act provides that, "*...before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.*" As such, the Respondent's decision to extend the validity period in respect of Tender No. KPA/114/2016-17/ADM, after the validity period had already lapsed, is a violation of the aforesaid provision of the law thereby rendering the Respondents decision to award the said tender to some bidders null and void for all purposes.

4. The Applicant further states that the Respondents failed to notify the Applicant of the outcome of its bid, and that the Applicant only came to learn that the Respondents had made awards in respect of Tender No. KPA/114/2016-17/ADM on 2nd September, 2017 and immediately wrote to the Respondents to confirm the position. However, the Respondents refusal to disclose to the Applicant the outcome of its bid in violation of the right to information under Article 35(1) of the Constitution. As a result of the Respondent's aforesaid failure to notify the Applicant, the Applicant could not possibly file a review before the Public Procurement Review Board within 14 days as provided under Section 167 of the Public Procurement and Assets Disposal Act, 2015 thus rendering this action necessary.

5. The Applicant's case is that the Respondents actions, of extending the validity of a Tender which had lapsed, are negligent and amount to a total affront to Article 10, 47, 201 and 207 of the Constitution of Kenya, 2010 and also of the relevant provisions set out in the Public Procurement and Assets Disposal Act which oblige the 1st Respondent as the procuring entity to strictly act in an accountable manner so as to ensure that public funds are expended strictly in accordance with the Law and not otherwise. The Applicant states that the decision made by the Respondents is in clear violation of Section 88 of the Public Procurement and Assets Disposal Act, 2015 and should not be left standing by this court. That therefore the Respondents should be directed to re-tender the said services a fresh.

The Response

6. The motion is opposed by the 1st and 2nd Respondents vide Grounds of Opposition filed herein on 31st October, 2017. Further, the Respondents filed a Replying Affidavit in opposition to the motion. The Replying Affidavit is sworn by Cosmas Makori on 30th October, 2017. In their Grounds of Opposition the Respondents state that the Applicant is in possession of confidential material which it is seeking to rely on in its Judicial Review application, which is contrary to Section 67 and an offence under Section 176(1) (f) of the Public Procurement and Asset Disposal Act, 2015 and Article 227 of the Constitution of Kenya. The Respondents state that the Applicant has sued the 2nd Respondent under the guise that he is the 1st Respondent's Accounting Officer which is contrary to Section 2(1) of the Public Procurement and Disposal Act, 2015, Section 2(1) and Section 67 of the Public Finance Management Act as well as Section 5 of the Kenya Ports Authority Act. Further, the Respondents aver that the Applicant is disentitled to the reliefs sought for having contravened the express provisions of the Public Procurement and /Assets Disposal Act 2015 and the Constitution of Kenya. The application for Judicial Review is therefore incompetent for failing to attach a copy of the impugned decision as required under Order 53 Rule 7 of the Civil Procedure Rule and should be dismissed with costs.

7. Further, the Respondents state through the Replying Affidavit that the description of the 1st Respondent in paragraph 2 of the statement of Facts is erroneous since the 1st Respondent was established by the Kenya Ports Authority Act Cap 391 of the Laws of Kenya and not Cap 469 of the Laws of Kenya as described by the application. The 2nd Respondent avers that he has been wrongly sued and described as the accounting officer of the 1st Respondent. The 2nd Respondent avers that the only accounting officer for the 1st Respondent is the Managing Director pursuant to Section 2(1) of the Public Procurement and Disposal Act, 2015, Sections 2(1) and Section 67 of the Public Finance Management Act and Section 5 of the Kenya Ports Authority Act. The 1st Respondent admits that on 15th March 2017 it published an advertisement notice for various Tenders which included Tender No. KPA/114/2016-17/ADM for the provision of Housekeeping services (Preference Groups). In the Advertisement notice, prospective bidders were advised to regularly visit the KPA website to obtain any additional information/addendum on the tenders, and that this information was reiterated in Section I: Invitation for Tenders, Clause 6 which is located at Page 7 of the Tender Document. The Tender was opened on Tuesday 4th April 2017 in which a total of 212 firms submitted bid documents. The 1st Respondent carried out a comprehensive technical evaluation and the Applicant was found to be non-responsive at preliminary stage. Following the extension of the tender validity period under Section 88 of the Public Procurement and Asset Disposal Act 2015, the 1st Respondent finalized the procurement process including carrying out notifications to both successful and unsuccessful bidders within the tender validity period.

The 1st Respondent notified the Applicant vide a letter dated 9th August 2017 as required by the provisions of Section 87(3) of the Public Procurement and Disposal Act 2015. The Applicant was called to collect their letter and an advance email copy was also sent. (This was annexed and marked as CM1 to the Replying Affidavit of Mr. Cosmos Makori). It is the 1st Respondent's case that the Applicant was duly notified in good time but opted not to file a request for review under Section 167 of the Public Procurement and Asset Disposal Act 2015 and is now trying to obtain orders that he is statutorily barred from obtaining due to his own indolence. The Respondents state that the application herein is incompetent because the Applicant has attached confidential material contrary to Section 66 and 67 of the Public Procurement and Asset Disposal Act 2015 which he is seeking to rely on to quash the decision of the 1st Respondent. This is in reference to annexure SG-4 of the Applicant's Verifying Affidavit attaching a letter of notification of award to M/s. Zamilmar Enterprises Limited. The Respondent states that according to Section 176 of the Public Procurement and Assets Disposal Act 2015, possession of this sort of confidential material constitutes a criminal offence. Secondly, the Respondents point out that the Applicant filed a request for review in another similar Tender No. KPA/112/2016-17/MO for the provision of cleaning and landscaping services (Preference Groups) before the Public Procurement and Administrative Review Board which was found to be incompetent and subsequently dismissed for having wrongly sued the 2nd Respondent under the guise that he is the Accounting Officer of the 1st Respondent. (A copy of the Ruling was annexed and marked CM2). Thirdly, the Respondent states that the Applicant has failed to attach the impugned decision that he is seeking to have quashed.

The Interested Parties

8. Before the motion could be heard, the Interested Party filed two Notice of Motion applications both dated 9th February, 2018. The first application sought to enjoin the Interested Party to these proceedings. This application was allowed by the consent of all the parties in this matter.

9. The second application sought the following orders:

- (a) That the application be certified as urgent and service of the same be dispensed with in the 1st instance.
- (b) That this court be pleased to direct and order that the Interested Parties herein do continue to offer their contracted services to the Respondent, pending the hearing of this application.
- (c) That this court be pleased to direct and order that the orders of this court made on the 25th January, 2018 do not affect the Interested Parties' contract with Respondents herein.
- (d) That the costs herein be provided for.

10. The court directed that the above said Interested Parties application be heard together with this motion. The Interested Parties' case is that they are directly affected by the orders of this court issued on 22nd January, 2018, yet they are not part of the dispute on the main application. So they stand to suffer unless their services are allowed to go ahead unhindered. **Mr. Adan Issack** on behalf of the Interested Parties deposed to the Supporting Affidavit sworn on 9th February, 2018. Their case is that they are privileged to be qualified to offer services to Kenya Ports Authorities. They belong to what is called 'Preference groups' i.e. preference given to youths and women and other disadvantaged groups. On October, 2017 they received invitation to quote for housekeeping services and gave all their quotations and eventually their bids were accepted, and that as instructed, they commenced work on the 1st February, 2018. To be able to work, they were all subjected to training by the 1st Respondent herein and thereafter their employees were also subjected to training with regard to safety again by the 1st Respondent herein. As expected, they prepared their employees and even got accommodation for their employees as the sites were different as indicated below:

- (a) Automic Enterprises – Mombasa
- (b) Jasy solutions – Nairobi
- (c) Bokola Trading – Mombasa
- (d) Sinbad Projects Limited at Lamu, Gede
- (e) Royalnic Cleaners Limited – Mombasa

11. The Interested Parties aver that the deployment of staff and the trainings were all done at their costs and expenses. They were therefore surprised when on 31st January, 2018 the 1st Respondent wrote letters to them advising them to stop working quoting an order of this court. The stoppage of their work cost a lot of money, expenses and anxiety over a matter in which they are not involved. The Interested Parties aver that their contract is not related to any tender at all and that they are not part of the dispute with regard to Tender No. KPA/114/2016-2017/ADM. They urge this court to direct that the court's order did not in any way stop their services which were already midway and that for avoidance of doubt they have not been awarded Tender No. KPA/114/2016-2017/ADM.

12. The 1st and 2nd Respondents do not oppose the application by the Interested Parties. The Respondents state that due to the stay orders issued herein on 22nd January, 2018 they had to extend the essential services and due to the cancellation of all the subsequent tenders, and pending the determination of these matters in court, the 1st Respondent has from the year 2016 and on short-term basis, extended the

contracts of those service providers under the expired contract. The last extension period expired on 31st January, 2018. That owing to the expiry of these contracts and in strict compliance with this court's Order not to progress the Tender No. KPA/114/2016-17/ADM pending the determination of this matter, the 1st Respondent therefore, requested for quotations for provision of housekeeping services on short-term basis and in accordance with Sections 91(2) and 105 of the Public Procurement and Asset Disposal Act No. 33 of 2015.

13. On its part the Ex parte Applicant opposed the Interested Parties applications on the grounds that the intended Interested Parties application dated 7th February, 2018 is in pursuit of an illegality. That the intended Interested Parties are disentitled to the reliefs sought based on the principle of *ex-turpi causa non oritur action*. That as long as the orders granted by the court on 22.9.2017 are still in force, the intended Interested Parties application herein cannot stand. The application is itself scandalous, frivolous, vexatious and a deliberate ploy to delay the hearing and determination of Ex-parte Applicant's application dated 24th January, 2018.

Submissions

14. Parties filed submissions. The Applicant filed submission on 20th November, 2017 and highlighted the same in court. Mr. Gikandi for the Ex parte Applicant relied on the background facts relating to this matter as captured in the Notice of Motion dated 26th September, 2017 and the supporting affidavit sworn by Simon Gachemi on 19th September, 2017 at the leave stage. Mr. Gikandi submitted that the Ex-parte Applicant was one of the bidders in respect of tender no. KPA/114/2016-17/ADM, for provision of housekeeping services, which was floated by the Respondents. However, the Respondents have never notified the Ex-parte Applicant the fate of its bid to date. On 2nd September, 2017 the Ex-parte Applicant learnt that other bidders who took part in the aforesaid tendering process had been notified of the outcome of the bids and in fact, the Respondents were in the process of executing contracts with some of the aforesaid bidders. Mr. Gikandi submitted that under **Section 87 (3) and 176 (K) of the Public Procurement and Assets Disposal Act, 2015** the Respondents are under a legal obligation to notify the Ex-parte Applicant whether its bid was successful or not. However, the Respondents have not cared to discharge the aforesaid obligation. In fact, on 11th September, 2017 when the Ex-parte Applicant requested for the said information, the Respondents never cared to respond to the same. Even though the Respondents alleges at paragraph 10 of the replying affidavit that the Ex-parte Applicant was notified of the outcome of its bid, Mr. Gikandi submitted that the Respondents have not produced any evidence to show that either it indeed called the Ex-parte Applicant, the Ex-parte Applicant collected the said letter or the Respondents posted the alleged notification in the Ex-parte Applicant's postal address as required by law. Counsel submitted that the burden to prove that the said notification was served upon the Ex-parte Applicant lies on the Respondents and they have not discharged the same. Counsel cited the decision in **Postmaster General vs. Postal Corporation of Kenya-Am No. 43 of 2009** as affirmed in **Nairobi Judicial Review No. 53 of 2010; Republic vs. Administrative Review Board & 2 others Ex-parte Zhongman Petroleum and Natural Gas Group Company Limited** where it was stated,

“The Board has held severally that the burden of proof on the issue of notification lies on the Procuring Entity which has a duty under section 67 of the Act, to notify- in view of the above, the Board holds that time started being on 15th October, 2009, when the Applicants representative collected a notification letter from the Procuring Entity”.

15. Mr. Gikandi submitted that bearing in mind that the Respondents have not replied to the Ex-parte Applicant's letter dated 11th September, 2017 requesting to be notified of the outcome of its bid it is not open for the Respondents to allege that they notified the Ex-parte Applicant. If the same was true, the Respondents would have simply replied to the said letter and indicate that the same was served. Further, since the Respondents have not brought any evidence to support their allegation that they notified the Ex-parte Applicant of the outcome of its bids, Mr. Gikandi urged the court to find that the Ex-parte Applicant was not notified of the outcome of its bid by the Respondents. Counsel cited the decision in **Linus NgangaKiongo & 3 Others vs. Town Council of Kikuyu [2012] eKLR** where the court stated thus:

“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. RajuGovindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

16. Again in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. Mr. Gikandi submitted that the evidence by the Ex-parte Applicant to the effect it was not notified of the outcome of its bid is unchallenged and the court should take the same as the truth of the matter.

17. On whether the Ex-parte Applicant was served with the notice of extension of the tender validity in respect of tender no. KPA/114/2016-17/ADM, Mr. Gikandi submitted that under Section 88 (2) of the Public Procurement and Assets Disposal Act, it is provided that, “the accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender”. However, the Respondents failed to notify the Ex-parte Applicant of the alleged extension of tender validity period. Counsel submitted that the Respondents have not produced any evidence to show that the Ex-parte Applicant was notified of the extension of the tender validity period.

18. As to whether the awards made in respect of tender No. KPA/114/2016-17/ADM are proper, Mr. Gikandi submitted that the validity period for Tender No. KPA/114/2016-17/ADM was 90 days starting from 4th April, 2017, which was the tender opening date. This is provided for under Section 17. 1 of the tender document which states, **“The tender validity period shall be [90] days after the deadline for Tender submission specified in the Tender data sheet.”** As such, counsel submitted that the tender validity period in respect of Tender

No. KPA/114/2016-17/ADM lapsed on 4th July, 2017. Consequently, the letter dated 11th July, 2017 by the Respondents indicating that the tender validity had been extended by further 30 days effective from 16th July, 2017 had no effect because the said tender had already naturally died. Counsel referred the court to Section 88 (2) of the Public Procurement and Assets Disposal Act, which provides that, **“Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period”**. It was submitted that the tender validity for Tender No. KPA/114/2016-17/ADM lapsed on 4th July, 2017 and so the purported extension of the tender validity by the Respondents is and was null and void for all purposes. Counsel cited the decision in **Review No. 2 of 2010; Zhongman Petroleum & Natural Gas Group Limited vs. Equipment Company Ltd & another**, where the Public Procurement Board held that, **“once tender validity expires, the tender dies a natural death.”** See also the decision in **Republic vs. Public Procurement Administrative Review Board & another Ex-parte University of Eldoret [2017] eKLR** where the court held that, **“...I hereby quash the proceedings and decision of the Review Board made on 7th April, 2016 and in the same vein, having found that the Ex parte applicant’s actions of failing to notify the tenderers of the outcome of the tender process was illegal and that its clandestine procurement of the goods subject of the tender to third party was illegal...”**.

19. It was submitted that having failed to extend the tender validity period before the 4th July, 2017 when the same lapsed, there stood no tender known as Tender No. KPA/114/2016-17/ADM. As such, any other action undertaken by the Respondents in respect of Tender No. KPA/114/2016-17/ADM after 4th July, 2017 is null and void for all purposes and this court should declare the same as such. The Ex- parte Applicant prayed for the orders in the motion.

20. On her part Ms. Ikegu for the Respondents raised the following three issues on which she submitted.

(i) Whether the 1st Respondent’s letter dated 9th August 2017 constitutes a decision that is capable of being quashed by an order of certiorari?

(ii) Whether the application falls within the purview of Judicial Review?

(iii) Whether the Applicant is entitled to the reliefs sought?

21. Ms. Ikegu submitted that Judicial Review procedures are very special and substantive procedures that are governed by the Law Reform Act Cap. 26 Laws of Kenya and Order 53 of the Civil Procedure Rules 2010. The decisions that are capable of being quashed by an order of certiorari are contemplated under Order 53 rule 2 of the Civil Procedure Rules 2010. They include and are limited to a Judgment, order, decree, conviction or other proceedings for purposes of being quashed. The Applicant is further required under Order 53 rule 7 to produce a copy of the decision to enable the court discern the procedure that was followed or the irregularities or impartialities complained of.

22. It is the Respondents’ submission that the notification sent out to the bidders both successful and unsuccessful on 9th August 2017 does not constitute a decision capable of being quashed. The same is merely meant for the purposes of communication and does not fall within the province of decisions as defined by Order 53 rule 2 of the Civil Procedure Rules 2010. **Black’s Law Dictionary** defines a decision as **“a judicial or agency determination after consideration of the facts and the law”**. Counsel cited the decision in **Samuel Njuguna Njoki & 24 others vs. Betting Control & Licensing Board & 2 others [2016] eKLR**, where Justice H. K. Chemitei held:

“Weighing against the provided documentary evidence on record, I do not find that the applicants herein have brought themselves within the province of Judicial Review. Their remedy could be elsewhere. The impugned letter in my view is not a decision properly so called as provided under Order 53(2) of the Civil Procedure Rules. The letter is a mere communication to other state actors.”

23. This position was upheld by Justice G. V. Odunga in **Republic vs. Registrar of Political parties & 6 others ex parte Edward Kings Onyancha Maina & 7 others [2017] eKLR** and Justice M. J. Emukule in **Republic vs. Land Registrar & 3 others Ex parte Aryan Limited [2016] eKLR**. Ms. Ikegu submitted that the notification sent out by the 1st Respondent on 9th August 2017 is purely for information and does not constitute a decision capable of being quashed. Counsel further argued that the Applicant’s failure to attach the so called decision under Order 53 rule 7 of the Civil Procedure Rules 2010 renders the application fatally defective, which should not be treated as a mere technicality but is a mandatory substantive procedure. The provision further requires that in the event the applicant does not produce a copy of the order, warrant, commitment, conviction, inquisition or record that it is seeking to have quashed, then the Applicant is required to account for its failure to do so to the satisfaction of the High Court. Counsel submitted that this provision has not been complied with by the Applicant and therefore the Application is incurably defective.

24. As to whether the Application falls within the purview of JR?

The parameters of Judicial Review were clearly set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic and Umoja Consultants Ltd. Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters....The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

25. Ms. Ikegu submitted that the Applicant has not demonstrated to this court how the 1st Respondent in arriving at the decision to award the tenders to the successful bidders breached any procedural requirements, such as making a decision that was outside its jurisdiction, taking

into account irrelevant matters and not observing the rules of natural justice. Counsel submitted that the 1st Respondent validly extended the tender validity period under Section 88 of the Public Procurement and Assets disposal Act 2015 for a further 30 days effective from 16th July 2017 and bidders were notified of the same vide a letter dated 11th July 2017. The award and notification having been made by 9th August 2017, were all done within the tender validity period. On the fate of the 2nd Respondent Ms. Ikegu submitted that the 2nd Respondent is a private citizen and not an administrative body and cannot therefore fall within the purview of Judicial Review since he cannot reasonably be expected to grant any of the reliefs sought under a Judicial Review application. Counsel cited the case of **Republic vs. Ministry of Education, Science and Technology & 2 others ex parte School Management Kakiptui Primary School [2017] eKLR**, where Justice Githua observed as follows:

“Judicial Review is a challenge on administrative function. And consequently, Judicial Review remedies can only be issued against public or statutory bodies, public officers, tribunals or courts inferior to the High Court where it is claimed that any of them has either abused its or their powers by acting either arbitrarily, unreasonably, illegally or in excess of their jurisdiction or where they have failed to perform their public duties. Private entities or individuals sued in their private capacities are not amenable to Judicial Review – See also Republic vs. Gerald Muthee & 3 others Ex parte Kithaka Kiragacha (2007) eKLR.”

26. As to whether the Applicant is entitled to the reliefs sought, Ms. Ikegu submitted that the grant of Judicial Review reliefs is a discretionary remedy, which requires the judicial officer to exercise caution based on sound legal principles. It is the Respondents' submission that the Applicant has not come to court with clean hands, since it has breached fundamental provisions of the Public Procurement and Assets Disposal Act 2015 and is attempting to use the courts to sanction its illegal activities. Counsel submitted that as indicated in Cosmas Makori's Replying Affidavit at paragraph 13 (a), the Applicant in filing this application annexed a letter of another bidder which is contrary to Section 66 and 67 of the Public Procurement and Assets Disposal Act 2015 and constitutes an offence under Section 176 of the same Act. We urge this court not to grant the orders requested as the same would be tantamount to enforcing an illegal contract arising from an illegal action by the Applicant. We rely on the decision of the Court of Appeal in **Kenya Airways Limited vs. Satwant Singh Flora [2013] eKLR**, in which the Learned Appellate Judges held as follows:

“From the evidence adduced, the respondent was engaged in employment without a valid work permit after his work permit expired on 14th January, 1997. He, therefore, committed an offence under the then Immigration Act. The employment contracts that were entered between him and the appellant were, therefore, tainted with illegality and could not stand. As stated above, it is trite law that no rights accrue from an illegal contract.”

In the case of **MISTRY AMAR SINGH VS. SERWANO WOFUNIRA KULUBYA, 1963 EA 408** the Privy Council, on appeal from a judgment and order of the East African Court of Appeal, at page 414. Lord Morris of Borth-y-Guest, in his speech, quoted with approval the following passage from the Judgment in **SCOTT VS. BROWN, DOERING, McNAB & CO, (3), [1892] 2 QB 724 Lindley LJ** at p. 728:

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

Counsel also referred court to the case of **HEPTULLA VS. NOORMOHAMED, [1984] KLR** page 58 where the court held:

“No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.”

Ms. Ikegu urged the court not to exercise discretion in favour of the Applicant who is allegedly attempting to use the court to foster an illegal activity.

The Determination

27. Having analyzed the application and the submissions by Counsel, the issues that arise for determination by this court are whether an order of certiorari should be issued by this court to quash the decision made on 9th August 2017 in respect of Tender No. KPA/114/2016-17/ADM by the Respondent and as a result direct the 1st Respondent to undertake a fresh tendering process and whether grant of leave to apply for Judicial Review orders sought should operate as a stay against the Respondents, their agents and servants from executing any contracts in respect of Tender No. KPA/114/2016-17/ADM.

Whether an order of certiorari should be issued by this court to quash the decision made on 9th August 2017 in respect of Tender No. KPA/114/2016-17/ADM by the Respondent

28. The Ex-parte Applicant claims that it was one of the bidders for tender no. KPA/114/2016-17/ADM for provision of housekeeping services issued by the 1st Respondent. The Applicant claims that it was never informed of the fate of its bid and it was only on 2nd September, 2017 that it found out that the unsuccessful and successful bidders had been informed of the outcome of the tendering process. Counsel for the Applicant contended that Section 87(3) and 176 of the Public Procurement and Assets Disposal Act, 2015 requires the 1st Respondent to inform the bidders whether they were successful or not. The Applicant further claims that it wrote to the 1st Respondent on 11th September, 2017 requesting to know the status of their bid but the 1st Respondent did not respond. The Respondents on their part claimed that the Ex-parte applicant was notified about his bid vide a letter dated 9th August 2017. Further, the Respondents stated that the

Ex-parte applicant was called to collect their letter and an advance copy was sent via email.

29. The Ex-parte applicant submitted that the tender in question had been extended after its validity period had expired therefore the validity of the extension was null and void. Counsel for the Ex-parte Applicant explained that the subject tender was opened on 4th April 2017 and was valid for 90 days. Counsel submitted that the tender validity period for the tender lapsed on 4th July 2017. However, the said tender was extended for a further 30 days effective from 16th July, 2017, a date by which, according to Counsel the tender had already lapsed. Counsel referred to Section 88(2) of the Public Procurement and Asset Disposal Act which provides for the extension of period of a tender prior to expiry of the validity period. Counsel argued the 1st Respondent having failed to extend the tender validity period before 4th July, 2017, any action taken by the Respondents after 4th July 2017 was null and void.

30. Section 87 of the Public Procurement and Asset Disposal Act provides as follows:

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted. (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

This Section requires the accounting officer of the 1st Respondent to inform bidders in writing whether they were successful or not. In this case, the Ex-parte Applicant claims that it was never informed that its bid was unsuccessful. The Respondents contend that they wrote to the Ex-parte Applicant and informed it that its bid was unsuccessful.

31. I have perused the documents filed by the parties as part of their pleadings. In the replying affidavit of the Respondents sworn by COSMAS MAKORI is annexed a copy of a letter dated 9th August, 2017 marked as "CM 1" addressed to the Applicant herein. In the said letter, the 1st Respondent indicates that the Ex-parte Applicant's bid was unsuccessful and the reasons therein. In the replying affidavit in response to the application dated 19th September, 2017 by the Ex-parte Applicant, the Respondents attach copies of letters addressed to other bidders informing them that their bids were unsuccessful. The Ex-parte Applicant does not dispute the existence of the copy of the letter dated 9th August, 2017 but claims that the same was never mailed or emailed to it. The Ex-parte Applicant in its application for leave to commence Judicial Review proceedings annexed a copy of a letter sent to one "M/s Zamilmar Enterprises Ltd" by the 1st notifying it that its bid was unsuccessful. The said letter I presume did indeed reach M/s Zamilmar Enterprises as the Ex-parte Applicant did not indicate that it was obtained from the 1st Respondent.

32. In the case of **Republic v Public Procurement Administrative Review Board & 2 Others Team Engineering Spa EX PARTE [2014] eKLR**, Odunga J observed as follows:

"This submission in my view seems not to have recognized the applicant's core complaint being that it never received the notification. As was held in Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR, the burden of proof on the issue of notification lies on the Procuring Entity. The applicant having denied notification, it was upon the Procuring Entity to prove on the standard of balance of probability that the applicant was duly notified of the decision of the Procuring Entity. To contend that the applicant ought to have adduced evidence from its computer that it did not receive the notification would not only amount to shifting the onus of proof but to compel the applicant to prove a negative. I appreciate that under Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by Seaton, JSC in the Uganda Case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991:

"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat not ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons..... As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced." See Constantine Steamship Line Ltd vs. Imperial Smelting Corp [1914] 2 All ER 165 (H.L.); Trevor Price vs. Kelsall [1975] EA 752 at 761; Phipps on Evidence 12th Ed Para 91; Phipps At Para 95.

Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them".

I do agree with the sentiments above. It would be unfair to impose the burden of prove on the respondents herein. Therefore, it was upon the Ex-parte Applicant to prove that indeed they were not notified whether their award was successful.

33. Section 88 of Procurement and Asset Disposal Act provides for the extension of the tender validity period. It reads as follows:

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender. (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).

The parties herein do not dispute that the tender in question was opened on 4th April, 2017 and was valid for 90 days. The Respondents did not tender any evidence to contradict the Ex-parte Applicant's assertion that the tender was extended for a further 30 days with effect from 16th July, 2017. As I understand it, the subject lapsed on 4th July, 2017 when the 90 days validity period came to an end. The Respondents could therefore not have extended a tender whose life span had already ended. As of 16th July, 2017 the subject tender did not exist. The Respondents could not extend validity for what did not exist.

34. The Ex-parte Applicant seeks to quash the decision made on 9th August 2017 by the Respondents. An order of certiorari is issued by the court where it is found that the decision made was unreasonable, illegal, based on irrelevant matters or that the administrative body lacked the jurisdiction to entertain the matter. In this case, the decision reached by the Respondents to award the subject tender was based on an illegality as the tender validity had already lapsed and the purported extension was null and void. However, the Respondents contended that the decision provided for quashing by the Ex-parte Applicant was not a decision in accordance with Order 53 Rule 7 of the Civil Procedure Rules but a mere notification. The Respondents argue that the notification sent out to bidders both successful and unsuccessful on 9th August, 2017 does not constitute a decision capable of being quashed. To the Respondents, the failure by the Ex-parte Applicant to attach the proper decision rendered the application defective.

35. Order 53 Rule 7 reads:

7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

36. I have keenly perused through the application for grant of leave to file Judicial Review proceedings and the substantive motion by the Ex-parte Applicant. The only document that is dated 9th August 2017 is a copy of a letter addressed to M/s Zamilmar Enterprises Ltd annexed to the affidavit of SIMON GACHEMI and marked as "SG-4". I presume that this is the alleged decision that the Ex-parte Applicant seeks to quash as there is no other document dated 9th August, 2017.

37. Does the letter dated 9th August, 2017 amount to a decision that can be quashed by way of an order of certiorari? For clarity I will quote verbatim the contents of the said letter:

PSM/CTC/1/03 (114) Vol. 1(89)

9th August, 2017

M/s Zamilmar Enterprises Ltd,

Jomo Kenyatta Avenue,

P.O Box 83547-80100,

MOMBASA

Tel: 0729718670

Email: info@zamilmar.com

RE: TENDER NO. KPA/114/2016-17/ADM-PROVISION OF HOUSEKEEPING SERVICES (PREFERENCE GROUPS)

Reference is made to your participation in the above captioned tender.

This is to inform you that your bid was not successful. Pursuant to Section 87(3) of the Public Procurement and Asset

Disposal Act, 2015, your bid was not technically responsive as required in the instructions to Tenderers, Clause ITT 12.1 & 28.2 of the tender document.

We however thank you for your participation in the tender and look forward to working with you in the future. Attached herewith please find your unopened financial bid.

Yours faithfully,

Yobesh Oyaro,

Head of PROCUREMENT & SUPPLIES MANAGER

FOR: MANAGING DIRECTOR

38. The letter basically informed the addressee that its bid was not successful. As indicated the letter was not sent to the Ex-parte Applicant but rather one M/s Zamilmar who was also a bidder for the subject tender.

39. The Black's law dictionary, 10th edition as correctly submitted by the Respondents defines the term decision as *"a judicial or agency determination after consideration of the facts and the law"*. The 1st Respondent who was the procuring entity considered the bids submitted by the various tenders. Some of the bidders lost out at the various stages of the procuring process and ultimately the 1st Respondent made its decision on the successful bidders. In my view, the said letter was a communication to the addressed bidder on the final status of their bidder. I do not think that the said letter amounts to a decision as envisaged by the Order 53 of the Civil Procedure Rules but a mere communication.

40. In the case of **Republic v Land Registrar & 3 others ex parte Aryan Limited [2016] eKLR**, Justice Emukule discussed whether a letter by the registrar amounted to a decision that could be quashed. He observed as follows:

"The evidence adduced shows that the Respondent realized that there was an error in the Certificate of Lease issued to the ex parte Applicant in that the same indicated the lessor as the Government of Kenya instead of Mohamed Raffiq Kanji who was the freehold title holder. The Respondent therefore called for the Certificate of Lease to rectify the same to reflect the right position and he explained as much in the subject letters. He did not in any way nullify the ex parte Applicant's Certificate of Lease so as to warrant quashing his decision.

My understanding of the letters is that they merely expressed the Respondent's intention to recall the titles for purposes of rectification. In the letter dated 2nd November, 2012, the Respondent even advised the ex parte Applicant to seek redress if they felt aggrieved by his actions. As was held by Omondi, J. in the above case, an advice which the ex parte Applicant had a choice to ignore cannot amount to a decision capable of being quashed. The Respondent therefore did not do anything capable of being quashed. It is until the Respondent rectifies the Certificate of Lease that the ex parte Applicant can challenge such an action, if aggrieved by it."

41. In my view, the letter dated 9th August, 2017 was mere communication to the Ex-parte Applicant of the decision of the Respondents. However, I am inclined to believe that there was a specific decision by the 1st Respondent that indicated who the successful bidders were. Therefore the letter dated 9th August 2017 is not a decision that can be subjected to an order of certiorari.

42. The Respondents submitted that the Ex-parte Applicant was not entitled to the reliefs sought as it had breached Section 66 and 67 of the Procurement and Asset Disposal Act by annexing the letter of another bidder. The Ex-parte Applicant did not submit on this issue. As I understand it the Respondents claim that the letter annexed by the Ex-parte Applicant was confidential and in no way should the Ex-parte Applicant have had access to it.

43. Section 67 of the Procurement and Asset Disposal Act states:

1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest; (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act. (4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

The confidentiality issues tackled by the above Section relate to the procuring entity, its employees or agents, members of a board, commissions or committees of the procuring entity. No reference is made with regard to confidentiality to the bidders. Therefore, I do not find that the Ex-parte Applicant breached Section 67 of the Procurement and Assets Disposal Act.

44. Having found that an order of certiorari cannot issue in this matter this court cannot in good faith stay the execution of the contracts with respect to Tender No. KPA/114/2016-17/ADM.

45. For the foregoing reasons the application dated 26th September, 2017 is hereby dismissed with costs.

46. The Interested Parties applications dated 9th February, 2018 are allowed.

Dated, Signed and Delivered at Mombasa this 5th day of July, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Ikegu for 1st and 2nd Respondents

Mr. Masila holding brief Gikandi for Ex parte Applicant

Mr. Magolo for Interested Parties

Mr. Kaunda Court Assistant