



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 52 OF 2018**

**In the matter of an application by Britam Life Assurance Company [K] Limited & Pioneer Assurance Company Limited for Judicial Review orders of *Certiorari* and *Prohibition***

**and**

**In the matter of the decision by the Public Procurement dAdministrative Review Board in Application No. 11 of 2018**

**and**

**In the matter of Section 8 and 9 of the Law Reform Act, Chapter 26 Laws of Kenya**

**and**

**In the matter of Section 175(1) of the Public Procurement and Asset Disposal Act, 2015**

**and**

**In the matter of Articles 10, 22, 23(3) (f), 43(1)(a) 47(1), 50(1), 165(6) & (7) and Article 227 of the Constitution of Kenya 2010**

**and**

**In the matter of Part III of the Fair Administrative Actions Act, 2015**

**and**

**In the matter of Request for Review of the Tender No. NHIF/017/2017-2018 for Provision of Group Life Cover and Last Expense for Civil Servants, National Police Service and Kenya Prisons Service for the Year 2017-2018**

**-BETWEEN-**

**Republic.....Applicant**

**-and-**

**Public Procurement Administrative Review Board.....1st Respondent**

**National Hospital Insurance Fund.....2nd Respondent**

**UAP Life Assurance Limited.....3rd Respondent**

**CIC Life Assurance Limited.....4th Respondent**

***Ex Parte***

**BRITAM Life Assurance Company (K) Limited.....1st *Ex Parte* Applicant**

**Pioneer Assurance Company Limited.....2nd *Ex Parte* Applicant**

**JUDGMENT**

***Introduction.***

1. It is established that the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article **277 (1)** of the Constitution. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

2. The national legislation prescribing the framework within which procurement policy must be implemented is the Public Procurement and Asset Disposal Act[1] (hereinafter referred to as the Act) and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article **47** of the Constitution and the Fair Administrative Action Act[2] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[3]

3. Section **3** of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***(a)*** *the national values and principles provided for under Article 10;* ***(b)*** *the equality and freedom from discrimination provided for under Article 27;****(c)*** *affirmative action programmes provided for under for under Articles 55 and 56;* ***(d)*** *principles of integrity under the Leadership and Integrity Act, 2012;* ***(d)*** *the principles of public finance under Article 201;* ***(e)*** *the values and principles of public service as provided for under Article 232;* ***(e)*** *principles governing procurement profession, international norms;* ***(f)*** *maximization of value for money;* ***(g)*** *…and ….*

4. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

5. Statutes do not exist in a vacuum.[4] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[5] The courts should therefore strive to interpret powers in accordance with these principles.

6. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

7. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[6]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others****[7]*** while citing Lord Denning:-[8]

> **“***The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”(Emphasis added).*

8. I now summarize the facts of this case as presented by the parties as a prelude to this court's analysis and determination of the issues at the heart of this case.

***The ex parte applicants case.***

*9. The ex parte applicants substantive Notice of Motion seeks the following orders:-*

> *a) An order of* ***Certiorari*** *to quash the determination and orders of the first Respondent herein in Public Procurement Administrative Review Application No.* ***11*** *of 2017 delivered on the* ***2nd*** *February, 2018;*
>
> *b) An order of* ***Prohibition*** *to prohibit and/or restrain the second Respondent from awarding the tender and/or signing any contract with the* ***3rd*** *Respondent herein in Tender No.* ***NHIF/017/2017-2018*** *For Provision of Group Life Cover and Last Expense For Civil*

*Servants, National Police Service and Kenya Prisons Service for the Year 2017-2018 as ordered by the Board in its decision of **2nd** February, 2018;*

*c) Such other, further order and/or incidental orders or directions as this Honorable Court shall deem just and expedient; and,*

*d) the costs of this application to provide for.*

10. *The grounds relied upon are* set out in the Statutory Statement filed there with and the verifying Affidavit of **David K. Ronoh**. Briefly, the grounds are:-

*a. The ex parte applicants participated as a bidders and were declared by the second Respondent herein as the successful bidders in **TENDER NO. NHIF/017/2017-2018,** They signed the contract with the second Respondent and received **50%** of the premiums worth **Kenya Shillings Four Hundred and Thirty Five Million, One hundred and Twenty Two Thousand and Ninety Two (Kshs.435,122, 092/-)** to administer jointly the insurance cover effectively placing on cover over **256,029** civil servants and their dependents. That the insured now risk loss and adverse exposure as a result of cancellation of contract.*

*b. That the fourth Respondent herein, an unsuccessful bidder, lodged a Request for Review before the Review Board, being **PPRB Application No. 11 of 2018** seeking nullification of the tender award and an order for fresh procurement process of the subject tender. In its decision delivered on **2nd** February,2018, the Board allowed the Request for Review and ordered **inter alia** that:-*

*i. The award of the tender to the ex parte applicants dated **19th** December,2017 together with the agreement dated **8th** January,2018 be and are hereby annulled.*

*ii. In order to avoid any inconvenience to the insured's who have already made claims to the successful bidders, the bidders shall process and pay out the said claims and refund the procuring entity the balance of any advance payment which was made to them by the Procuring Entity pursuant to the annulled award.*

*iii. Owing to the urgency involved in this matter the Procuring Entity is directed to award the tender to the lowest evaluated bidder (the third Respondent) at its tender sum of **Kshs. 797,623,500/=** within a period of **seven (7)** days from today's date.*

*c. That the 1st Respondent acted unreasonably and illogically in arriving at the said decision by awarding a tender to the third Respondent, an Interested Party who in the first place never moved the Board properly for grant of such orders, and that it acted without and in excess of its jurisdiction in purporting to grant orders which were never sought in the Review application.*

*d. That the **1st** Respondent acted without and in excess of its jurisdiction in reviewing the tender contrary to the express provisions of **Section 167(1)** of the Act for the Request for Review had been filed outside the statutory time of fourteen **(14)** days.*

*e. That the 1st Respondent acted beyond its jurisdiction in reviewing the tender contrary to the express provisions of section **167(4)** of the Act in a tender where a contract was already signed on **8th** January, 2018 (and execution ongoing) between the Applicants and the 2nd Respondent herein.*

*f. That the **1st** Respondent acted unreasonably and in excess of its jurisdiction in directing the procuring entity and persons it has contracted on how to settle claims and make refunds under the contract which had been signed pursuant to Section **135** of the Act.*

*g. That the 1st Respondent's acted in excess of its jurisdiction in directing the procuring entity to award the tender to the third Respondent, herein when the procuring entity had acted within the law and disqualified such a bidder for failing to comply with the requirements of the tender document.*

*h. That the impugned decision and particularly the order directing the procuring entity to award the tender to the third Respondent within **seven (7) days** is in contravention of Section **175(1)** of the Act which entitles the Applicants and/or other aggrieved parties to seek redress in the High Court within fourteen **(14)** days.*

*i. That the 1st Respondent's decision defeats and indeed contravenes the constitutional and legislative objective of public procurement law as captured in the express provisions of Article **227** of the Constitution and Section **3** of the Public Procurement and Asset Disposal Act 2015.*

*j. That the Board made an order that that pending claims be settled and premiums held by the **1st** Applicant, the lead underwriter be refunded, a declaration which on the face of it was made without considering the relevant fact that the insured's civil servants, national police service and Kenya prisons service have enjoyed cover from January **1**, 2018 and the Applicants as co-underwriters had also incurred attendant costs namely; Business Acquisition Costs and Administration Costs as a result of signing the contract.*

*k. Whereas Section **175(1)** of the Public Procurement and Asset Disposal Act, 2015 expressly entitles the Applicants to challenge the Board's decision within **14 days**, the Board in effect restricted this right to a period of **7 days** without any justification and to the detriment of the Applicants, and that it acted irrationally by ignoring the immense public interest premised on the social benefits that accrues to the officers in the Police Service, Prison Service and Civil Servants throughout the Republic of Kenya and their dependents because of the subject tender and which obviously outweighs the private commercial interests being pursued in the*

*Applicant in the Request for Application which had been filed before the Board.*

*l. That the **1st** Respondent failed to consider the public interest in saving public funds where a contract had been signed, rights vested and the process of lodging and settling claims had already been put in place.*

*m. Under section **175** of the PPADA, 2015 the decision of the review Board is amenable to a Judicial Review by this Honorable Court, and, unless restrained by this Honorable Court, the **2nd** Respondent will be left with no option but to comply with the impugned decision to the detriment of the Applicants.*

11. ***David K. Ronoh**, the second Ex parte applicants'* Chief Executive in his affidavit averred that upon evaluation of the bids, the *ex parte* applicants were notified vide letters dated **5th** December, 2017 that their bids were successful, and that they were recommended for the award of the tender as co-insurers. Also, he averred that by letters dated **19th** December,2017, the second Respondent informed them that they had been awarded the tender at an annual premium of **Kshs. 836,946,330** with the first Applicant as the lead underwriter and that the risk sharing ratio is as tabulated below:-

| NO. | NAME OF UNDERWRITER | KSHS. |
|---|---|---|
| **1.** | BRITAM LIFE ASSURANCE COMPANY (KENYA) LIMITED | 435,212,091.60 |
| **2.** | PIONEER ASSURANCE COMPANY LIMITED | 401,734,238.40 |
| | **TOTAL** | **836,946,330.00** |

12. He averred that on the **8th January, 2018**, the *ex parte* Applicants and the second Respondent signed the contract and the *ex parte* Applicants as co-insurers received **50%** of the premiums worth **Kenya Shillings Four Hundred and Thirty Five Million, One hundred and Twenty Two Thousand and Ninety Two (Kshs.435, 122, 092/-)** to administer jointly the provision of the said services, that performance of the contract has been ongoing, and some claims have already been lodged and fully documented for settlement, while other are under process, while new claims are expected. He also averred that on the **15th** January, 2018 the fourth Respondent herein being one of the unsuccessful bidders filed a Request for Review challenging the legality of the tender process, and, in the said Request for Review, it sought the following orders:-

*a. the award to the successful bidder(s) be annulled and the entire procurement process be terminated.*

*b. the Board orders a fresh procurement process in respect of the said tender.*

*c. the Board directs the Director General PPRA to commence investigations into the tender together with other relevant Government agencies.*

*d. It be awarded costs of the Request for Review.*

13. **Mr. Ronoh** further averred that vide a letter dated **29th** January, 2018 the third Respondent sought a declaration that the award to the Applicants be nullified and instead they be awarded the tender. He avers that the Board acted unreasonably by awarding a tender to the third Respondent, an Interested Party who never moved the Board properly within the statutory timeline of **14** days. Further, he averred that the Review Board acted beyond its jurisdiction in reviewing the tender contrary to the express provisions of section **167(4)** of the Act in a tender where a contract was already signed; and execution was ongoing. He also averred that the impugned decision is marred with contradictions in that it annuls the contract and also directs the applicants to process and pay claims based on the same contract.

14. He averred that that the impugned decision directs the procuring entity to award the tender to the third Respondent within **seven (7) days** contrary to section **175(1)** of the Act which entitles aggrieved parties to seek redress in the High Court within fourteen **(14)** days; that the decision is irrational, unreasonable, and illogical for ignoring immense public interest premised on the social benefits that accrues to the insured persons which outweigh private commercial interests and is marred by errors and misinterpretation of the applicable law.

**First Respondent's Replying Affidavit.**

15. **Henock K. Kirungu** the Review Boards' Secretary swore the Replying Affidavit dated **28th** February 2018. He averred that after the Request for Review was filed, the Board served notifications as provided under Regulation **74 (1)** and **74(2),** and that on **30th** January, 2018, the 2nd Respondent filed a response requesting its dismissal with Costs. He averred that the Review Board framed the following issues for determination:-

*a. Whether or not the Board has the jurisdiction to hear and determine the Request for Review on the ground that the same was filed out of time.*

*b. Whether or not the Board has the jurisdiction to hear and determine the Request for Review on the ground that a contract has been entered into between the Procuring Entity and the successful bidders.*

*c. If the Board has the jurisdiction to hear and determine the Request for Review.*

*d. Whether or not the Procuring Entity can render insurance services under the provisions of the NHIF Act.*

*e. Whether or not the Procuring Entity contravened the provisions of Section **80(1)** of the Act and whether the awards made to the successful bidders was improper.*

*f. Whether the tender document used in this procurement was defective.*

*g. Whether or not the Board should allow the procurement process to proceed on account of public interest.*

*h. What order should the Board make in the circumstances of this case.*

16. He averred that the Review Board took into consideration relevant facts in deciding the issues, and found that no notification was effected by the procuring entity under Section **87(3)** of the Act;[9] the contract signed on **8th** January 2018 was unlawful; and the tender evaluation committee acted unlawfully in awarding the tender to two firms contrary to the provisions of the Act and the tender documents. He averred that the Review Board allowed the Request for Review after considering the evidence and submissions, and that the was decision made pursuant to Section **173** of the Act, and that the *ex parte* Applicants have not demonstrated that the Review Board acted contrary to the principle of proportionality, or unreasonable exercise of power or irrationality, or abdicated its role, or acted contrary to legal principles, or impropriety of procedure to warrant varying the decision.

**Second Respondent's Replying Affidavit.**

17. **Ruth Makallah,** the Second Respondent's acting head of Legal Services/Corporation Secretary swore the Replying Affidavit dated **21st** February 2018 in support of the *ex parte* applicants case. She avers that by the closing date, **11** firms had submitted their bids, and the 2nd Respondent conducted the evaluation as per the evaluation criteria, and awarded the contract to the *ex parte* applicants being the **most responsive** Bidders on a co-insurance basis as stipulated in the Tender documents. She averred that the risk was shared based on the technical score, market share and benefits score, and that the fourth Respondent who was the Applicant before the Review Board failed to satisfy the technical requirements of the tender as per the technical evaluation criteria. Also, she averred that as provided under section **87** of the Act, all the bidders were notified of their responsiveness to the Tender by letters through post, and upon the lapse of the fourteen **(14)** days statutory period, the second Respondent and the winning bidders signed the contract. She averred that on **15th** January 2018, the fourth Respondent filed a Request for Review seeking orders:-

*(a) That the award be annulled and the entire procurement process be terminated;*

*(b) That the board orders a fresh procurement process;*

*(c) The Board directs the Director General PPRA to commence investigations into the tender together with other relevant government agencies;*

*(d) The Applicant be awarded the costs of this Request for Review.*

18. She averred that the third Respondent was notified that its bid was unsuccessful but despite the fact that it did not move the Board at all for any orders, the Board proceed to award it prayers as it "sought" in its **letter** dated **29th** January 2018 which letter was not a Request for Review and was in any event an afterthought and time barred. She averred that an Interested Party has no right to seek any substantive orders for itself; it can only support either an Applicant or Respondent in a proceeding and that under section **167 (1)** of the Act, The Board has no jurisdiction to entertain a Request filed outside the fourteen **(14)** days from the date of notification. Also, she averred that once a contract is signed, pursuant to section **167** of the Act, the Board has no jurisdiction to interfere with the same. She averred that the *ex parte* Applicants had complied with the contract prerequisites including providing the performance bonds.

19. She also averred that it would have been against the terms of the Tender Document to award the tender to one bidder, and stated that the Board disregarded express provisions of the Tender Document, thus, amended the terms of the Tender Document contrary to section **75** of the Act. Further, she averred that the Board committed material error in law, its decision was unreasonable and made in excess of jurisdiction and that it misconstrued, disregarded and or failed to appreciate core insurance issues involved in the contract.

**Third Respondent's grounds of opposition and Replying Affidavit.**

20. The third Respondent filed grounds of opposition on **21st** February 2018 stating:-

*a. No strong or clear case of unreasonableness on the part of the first Respondent has been made out, and that the decision is within the range of reasonable decisions.**[10]***

*b. The impugned decision is one which any reasonable decision maker would have reached having regard to the facts of the case. There is nothing perverse in the decision, nor are there contradictions, and it is reasonable. That there are instances when the decision maker's response is required to achieve a legitimate aim to ensure adherence to procedural law and to address concerns arising from unlawful and improper award of a tender. Further, the Respondent applied the principle of proportionality in arriving at the decision, and;*

*c. Public interest militates against the applicants.*

*d. That the delay in releasing the decision cannot be a ground for Review, that the decision is not ultra vires, & the burden is on the applicants to demonstrate that the Request for Review was filed out of time.**[11]***

*e. For the Board's jurisdiction to be ousted under Section **167**of the Act, the contract has to be signed in accordance with section **135** of the Act**[12]** and that there is nothing perverse in the decision.*

*f. That the third Respondent was pursuant to Section **170** of the Act a party to the Review and that Section **173 (a)** allows the Board to annul the decision of the accounting officer and to substitute it with its decision.*

*g. That the second Respondent issued two notifications to the applicants.*

21. In addition to the grounds, the third Respondent filed the Replying Affidavit of **Mwanzi Moseti,** its Principal Officer dated **21st** February 2018 who averred that in awarding the tender, the second Respondent did not observe the constitutional and statutory dictates, and that the third Respondent's tender having been determined to be responsive could not have been disqualified at the point the second Respondent purported to do so, that is, at the financial evaluation stage on the figure used for the total sum assured, which was not a criteria for financial evaluation, hence, the third Respondent was denied chance to participate unfairly and without any legal basis, and that the standard practice is to call for all tenders submitted. Further, he averred that having tendered the lowest responsive tender, the third Respondent expected that it would be awarded the tender as the Act requires. He also averred that the second Respondent in contravention of section **87** of the Act sent out two different notices, and that, it would be an affront to the Constitution to award the tender to the *ex parte* applicants whose bid will cost the taxpayers approximately **Ksh. 40** Million more than the third Respondent's bid.

**The Fourth Respondent.**

22. The fourth Respondent did not file any pleadings nor did it participate in these proceedings.

***Ex parte* Applicant's further Affidavits.**

23. **Mr. David K. Ronoh** in his further Affidavit dated **28th** February 2018 averred that the issues raised in **Mr. Moseti's** affidavit could have been addressed if a proper Request for Review had been filed, hence the determination that the tender be awarded to the third Respondent presupposed that said Respondent had challenged the tender and that as an Interspersed Party, the third Respondent could only support or oppose the application but could not seek and be awarded Remedies, hence, the Board exceeded its jurisdiction by awarding the tender to the third Respondent.

24. Further, he averred that notifications were vide a letter dated **5th** December 2017 and the letter dated **19th** December 2017 was a

subsequent communication between the procuring entity and the successful bidder with a view to finalizing the contract. He also averred that in awarding the tender to the third Respondent, the Board assumed the role of the procuring entity, purported to evaluate the bids and make an award, and, that the Board failed to consider that there was no request for Review by the third Respondent for it to interrogate why the procuring entity did not award the tender to the third Respondent, and that the *ex parte* applicants had incurred costs.

25. Also on record is **Mr. Ronoh's** further Affidavit dated **26th** April 2018. He averred that that the Board did not consider some of the relevant documents and issues placed before it and particularly that:- ***(a)*** *In their letter dated and filed before the Board on* ***26th*** *January,2018, UAP Assurance Limited admitted that they were notified that their bid was not successful on* ***21st*** *December,2017.* ***(b)*** *Through the* ***Replying Affidavit of Chrisostim Wafula*** *sworn on* ***1st February,2018****, the procuring entity also drew the attention of the Board to a number of issues which clearly raised jurisdictional questions as to whether the Board could award the tender to UAP Assurance Limited or not.*

26. He further averred that at **paragraph 7**, of the said Replying Affidavit, the deponent raised jurisdictional issues challenging any possibility of the third Respondent being awarded the tender and specifically deposed thus:-

> *"7. I have been advised by the procuring entity's counsel on record which advise I verily believe to be sound that the prayer sought by UAP Life Assurance Limited ought not to be granted to them for reasons that:-*
>
> *7.1. UAP Life Assurance never filed a proper Request for Review as provided for under the law, they are only participating in the proceedings as an interested party; and*
>
> *7.2. They are seeking orders from the Board outside the statutory time limit of 14 days and at a time when a contract has already been signed by the procuring entity and the successful bidders."*

27. He also averred that vide a letter dated **29th** January, 2018 crafted as request for review, UAP Assurance Limited, an Interested Party to the proceedings had purported to seek certain specific orders thus prompting the deposition in the Replying affidavit of **Chrisostim Wafula** sworn on **1st** February, 2018 above. He also averred that the Request for Review before the Board having been presented by **CIC Life Assurance Limited** and with specific orders sought, and in light of the foregoing the Board clearly had no jurisdiction to order for an award of the tender to the third Respondent and that the Board acted contrary the principle of proportionality in:-

> *a. nullifying a tender whose performance was already ongoing with obvious insurance cover benefits to the insured persons, only to order that it be awarded to a bidder who never moved the Board properly for such orders; and nullifying a tender whose performance was already ongoing and purporting to award it to a bidder who never moved the Board properly within the statutory time limit for such an award; and*
>
> *b. awarding the tender to a bidder whose bid was disqualified by the procuring entity and particularly in light of the deposition by the procuring entity that their bid would leave out risks worth over Kshs.* ***15*** *billon without insurance cover as was intended.*

**Issues for determination.**

28. Upon considering the detailed descriptions of the Parties' positions and submissions, I find that the issues that distil themselves for determination are:-

> *a. Whether the Board acted illegally in awarding the tender to "an Interested Party."*
>
> *b. Whether the Review Board usurped the functions of the procuring entity.*
>
> *c. Whether the Interested Party's Request for Review was time barred and if not whether the Interested Party's Request for Review was competent.*
>
> *d. Whether the Review Board's decision is unreasonable in that it directed the ex parte applicants to pay claims which had been made and refund the rest of the money/premium.*
>
> *e. Whether the Review Board acted illegally by failing to consider Public Interest.*
>
> *f. Whether the Board acted illegally by ordering the procuring entity to award the Tender within seven (7) days.*
>
> *g. Whether the Review Board acted illegally in failing to invite the parties to present arguments as to why the third Respondent had been disqualified by the Procuring Entity.*
>
> *h. Whether the Review Board acted unreasonably by annulling a contract that had been already signed and performance began.*
>
> *i. Whether the ex parte applicants are seeking a merit Review as opposed to a Judicial Review.*
>
> *j. What are the appropriate orders in the circumstances of this case?*

***a. Whether the Board acted illegally in awarding the tender to "an Interested Party."***

29. ***Mr. Gatonye*** faulted the Board for awarding the tender to the third Respondent who was invited into the Board as an Interested Party and who had not filed a Request for Review or applied for any orders. He argued that the Review application that was before the Board for determination, i.e. No. **11** of 2018 was filed by CIC Life Assurance Limited on the **15th**January, 2018.

30. Supporting the Applicant's case, **Mr. Moenga,** counsel for the second Respondent associated himself with **Mr. Gatonye's** submissions. He faulted the Review Board for awarding the tender to an Interested Party who never moved the Board properly for grant of such orders, and who had no express statutorily recognized right of audience before the Board. He termed the decision as unreasonable and submitted that Section **170** of the Act lists the parties to a review as:- ***(a)*** *the person who requested the review;* ***(b)*** *the accounting officer of a procuring entity;****(c)*** *the tenderer notified as successful by the procuring entity; and,****(d)*** *such other persons as the Review Board may determine.*

31. He submitted that the involvement of the 3rd Respondent was upon the invitation of the Review Board under section **170 (d),** which made it an Interested Party with a limited role in the proceedings. He argued that an Interested Party cannot introduce their own evidence and litigate independent substantive arguments in an attempt to obtain remedies for themselves. To buttress his argument, he argued that the said limitation was underscored by the Supreme Court in *Francis Karioki Muruatetu & another vs Republic & 5 others****[13]*** as follows:-

> ***[42]*** *" Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties.* ***An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court****. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."*

32. **Mr. K. Odhiambo** for the first Respondent argued that the onus is on the *ex-parte* Applicants to demonstrate that the decision was so absurd that no sensible person could ever dream that it lay within the powers of the authority[14] and argued that the Board gave the reasons for its decision, hence, it cannot be said to be unreasonable.

33. **Mr. Kiragu Kimani** for the third Respondent submitted that even though the third Respondent had not filed a substantive Request for Review, or any pleadings before the Review Board, the *ex parte* applicants and the procuring entity responded to the submissions made by the third Respondent before the Review Board. To buttress his argument, he cited *Joseph Amisi Omukanda vs Independent Elections and Boundaries Commission & 2 Others*,[15] where he argued it was held that there is an exception to the general rule when the court can determine an un pleaded issue, which is, where the parties raise an unpleaded issue and leave it to the court to decide and if no party is taken by surprise or prejudiced. He also argued that the Review Board invoked its powers under section **173 (c)** of the Act.

34. I have carefully the read the entire Court of Appeal decision *Joseph Amisi Omukanda vs Independent Elections and Boundaries Commission & 2 Others*,[16] cited by Mr. Kimani word by word. It arose from an election Petition. It did not address the issues under consideration or any of the issues raised in this case. It has no relevancy to this case or any of the issues under consideration. However, upon exercising due diligence, I was able to locate a decision in which the Court held a similar position to what Mr. Kimani cited. This is the case of *Odd Jobs vs Mubia.*[17] The facts of this case are worth examining to determine whether the holding can be applied in this case. The Respondent in the said case sued the appellant in High Court for money had and received being the proposed purchase price of a motor car in respect of which no completed contract had been entered into. No issues were framed in the High Court. In evidence the Respondent agreed that he had driven the car away but that it was a condition of the contract that the appellant should carry out repairs. Although the Advocate for the appellant objected to the evidence being given, he questioned hi witness about the alleged repairs and addressed the judge thereon.

35. Judgment was given for the Respondent on the ground that the appellant had failed to carry out an essential term of the agreement of sale. The appellant appealed, contending that the judge had no jurisdiction to decide the case on a ground which had not been pleaded. It was held that a Court may base its decision on an un pleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision and that on the facts the issue had been left for decision by the Court as the advocate for the appellant led evidence and addressed the Court on it.

36. The facts in *Odd Jobs vs Mubia****[18]*** enumerated above are clear. Only the principal parties were before the Court. Both parties presented evidence and cross-examined by the advocates. The case before me is peculiar. The third Respondent herein was an Interested Party before the Review Board. He never filed pleadings at all. He wrote a letter and was invited into the proceedings by the Review Board. He never deemed it fit to file a formal Request for Review as discussed elsewhere in this judgment. The Review Board did not direct him to file a formal Request. The only pleadings before the Review Board were those filed by the principal parties. The proceedings proceeded on the basis of the pleadings presented by the principal parties and issues arising there form. From the proceedings and circumstances of this case, it cannot be said that from the course followed at the trial, the issues were left to the Court to determine nor did the parties at any given time leave it to the Review Board to determine the issue whether or not the third Respondents letter was a Request for Review and whether or not an Interested Party could present an independent claim in the proceedings and seek a remedy independent from that sought by the principal parties. Such serious issues which go to the root of this dispute cannot be inferred from the circumstances of this case.

37. It is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[19]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ..., that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

38. The ratio of any decision must be understood in the background of the facts of the particular case.[20] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[21]Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[22] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[23] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[24] I need not add that the facts I the above are evidently distinguishable from the case at hand.

39. Section **170** of the Act provides that parties to a review shall be:- ***(a)*** *the person who requests the review,* ***(b)*** *the accounting officer of a procuring entity,* ***(c)*** *the tenderer notified as successful by the procuring entity; and* ***(d)*** *such other persons as the Review Board may determine. It is common ground that the third Respondent was a bidder, and he does not fall under* ***(a), (b),*** *and* ***(c)*** *above. He was invited by the Review Board under paragraph* ***(d)*** *above as an interested party*.

40. The third Respondent participated in the Review proceedings as an Interested Party having been invited as aforesaid. It is admitted that it did not file a Request for Review as contemplated under Section **167** of the Act, but it made submissions in the Review proceedings and the Review Board annulled the tender award and awarded it to the third Respondent, an Interested Party in the proceedings, who was not a principal party before it.

41. It is an old saying that there are at least two sides to every case. A problem for the courts is what happens when there are more than two. Our system of justice is limited in two very crucial respects. *First*, the courts are not proactive. No matter how pressing the issue or uncertain the relevant law, they generally have no jurisdiction to hear a case unless and until one is brought before them by two or more parties in dispute. *Secondly*, our adversarial system means that the courts rely on those fighting parties to bring to light not only the essential issues in a case but also all the relevant evidence and legal arguments. However, while this system works well for the most part, from time to time there are cases in which the contest between the parties fails to provide the court with all the information it needs to determine the issues at hand fairly. This limitation is especially problematic when the courts are called upon to decide questions of major public importance, with implications going beyond the facts of the case at hand.

42. Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider import than the concerns of the particular parties to the case. An Interested Party is someone who is identified by either the claimant or the defendant as being directly affected by the case (in particular, the relief that may or may not be granted by the court depending on whether it finds for or against the claimant). An Interested Party may also be added to the case by the Court itself, where it appears to the court that it is desirable to do so to resolve a dispute or issue.

43. In most cases, someone whose private interests are directly affected by a case could reasonably expect to join a case as an Interested Party. There are many different ways in which a third party might play a part in legal proceedings:- ***(a)*** *informally providing legal arguments or factual information to one or more of the existing parties;* ***(b)*** *offering a formal witness statement or expert witness statement to one of the existing parties;* ***(c)*** *intervening as a third party to provide either written legal submissions, or a witness statement, or both; or* ***(d)*** *intervening as a third party (as above), to put both written and oral representations before the Court.* However, these limited contributions can only support the submission of one side or the other and how they are used remain within the control of that party, not the would-be intervener.

44. The position remains that an Interested Party is not a principal party in the proceedings. The issues to be determined by the Court are those arising from the pleadings presented by the principal parties. The interested Party can only participate by assisting either of the parties or making submissions to help Court. This view is reinforced by the Supreme Court decision in the case of *Francis Karioki Muruatetu & another vs Republic & 5 others****[25]*** cited by **Mr. Moenga** whereby the Court stated that in every case, whether some parties are enjoined as Interested Parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. *An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court*. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

45. Article **163 (7)** of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. Clearly, the above decision, coming as it does from the Supreme Court is binding on this court by dint of Article **163 (7)** of the Constitution.[26] The binding nature of the Supreme Court decision under Article **163 (7)** is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[27] and that where the issues before the Court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.[28]

46. Sound judicial policy requires Courts and Tribunals to decide only that which is demanded by the facts of the case and is necessary for the proper disposal of the case. Wisdom requires Courts and Tribunals to resist the temptation to resolve issues not properly presented before them and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted.

47. The Review Board went beyond its powers in awarding the tender to an Interested Party who was not a principal party before it. It erred by failing to appreciate that the issues to be determined always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. *An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court*. There was no basis for the Review Board to depart from this established legal position, hence, this departure amounted to an illegality and the decision flowing there from is tainted with an illegality.

***b. Whether the Review Board usurped the functions of the procuring entity.***

48. ***Mr. Gatonye*** *for the ex parte Applicants faulted* the Review Board for making a determination as to whether the third Respondent was

the lowest evaluated bidder, an issue which was never the subject of the Review application before it, and argued that the third Respondent was not an applicant before it nor did it properly seek orders to that effect. He argued that Board acted beyond its jurisdiction by awarding to the third Respondent, a bidder the Procuring entity had disqualified from further evaluation on account of using a wrong figure of sum assured in calculating the premium and thereby arriving at a lower premium. He argued that the Board assumed and usurped the mandate of the procuring entity in so far as tender evaluations and awards are concerned.

49. **Mr. Gatonye** argued that ordering the tender be awarded to the third Respondent within **7** days was tantamount to the Review Board assuming the mandate of evaluating the tender and awarding the tender itself. He argued that this was tantamount to compelling the procuring entity to award the tender to a bidder whose bid had not been fully evaluated, hence, the Board exceeded its jurisdiction. He cited *Republic vs Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited,**[29]* in which the High court held that the effect of compelling the procuring entity to award the tender to a bidder before final evaluation was to compel the procuring entity to act contrary to the provisions of the law, which the Board had no power to do.

50. **Mr. Moenga,** counsel for the second Respondent supporting the *ex parte* applicants' case faulted the Board for disregarding the Tender Document and awarding the tender to a party who did not meet the requirements of the Tender Document. He cited *JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs Public Procurement Administrative Review Board & 2 others**[30]* where the Court opined as follows:-

> *106. "The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law"*

51. **Mr.Moenga** also cited *Blue Sea Services Ltd & another vs Public Procurement Administrative Review Board & another**[31]* where the Court stated:-

> *"In my finding, the power donated to the Respondent under section 173(a) & (b) are judicial in character and must therefore be exercised judiciously. To be exercised judiciously imply and mandate that the power must be exercised and decisions arrived at based on facts and reasons. The one fact that cannot be denied is that the tender documents set criterion for evaluation and minimum required score to enable one proceed to the next level of evaluation. To me failure to detect that Ollreggy did not meet the minimum requirement at technical evaluation was such a clearing omission that doesn't only defeat logic but demonstrate irrationality and unreasonableness. To the extent that the tender document is by law required to confirm to the legal requirement under the Act and the Constitution, that document is itself a derivative of the law and constitution and has the force of both. Therefore a party who flouts or tries to circumvent it, circumvents the law and to me that is an illegality."*

52. He also cited *Republic vs Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited*, [32] where the Court held that the powers of the Board can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally. He submitted that the Act makes it mandatory for evaluation and comparison of bids to be carried out using procedures and criteria set out in the Tender Document and any attempt to compel the procuring entity to disregard the criteria set out in the Tender Document is an act in excess of the Boards' jurisdiction. He further argued that the Board ignored express terms of the Tender Document by disregarding the fact that in order to arrive at the successful bidder, the Board acted in strict compliance with the criteria set out in the Tender Documents as Section **80(2)** of the Act demands. Also, he argued, the Board purported to award the Tender to only the third Respondent despite the Tender being express that the award was to be made **to more than one bidder**[33] and that the Board provided its own view of the tender documents should have provided.[34]

53. Further, **Mr. Moenga** argued that the Board committed an error of law when it exceeded its jurisdiction and purported to assume the mandate of the Tender Evaluation Committee as relates to evaluation of bids. Also, he argued that Section **173 (c)** of the Act is clear that the powers of the first Respondent only extend to substituting the decision of the Review Board with any decision **of the accounting officer** of a procuring entity. Further, he added that under section **80** of the Act, the evaluation of tenders is the mandate of the evaluation committee, which then submits its report to the accounting officer for approval. (See section **80 (5)**). He submitted that section **85** of the Act makes it clear that 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.[35]

54. **Mr.Kimani Kiragu** submitted that the third respondent was the lowest evaluated bidder, hence, the Review Board was justified in ordering that the tender be awarded to the third Respondent who ought not to have been disqualified.

55. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[36] This general principle is subject to certain recognized exceptions. However, the danger always exists that organs of state may apply this rule in a rigid and mechanical fashion or worse, as a means to manipulate the outcome of a tender process. As stated by Hoexter: "An otherwise unimpeachable tender may easily be disqualified at an early stage on a technicality, or organs of state may use defects 'opportunistically' to resile from otherwise unimpeachable contracts."[37]

56. Judicial oversight is necessary to ensure that such decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.[38] Indeed, our courts have exercised such oversight on numerous occasions. The administration of justice is highly contextual and fact sensitive. Consequently, what may amount to a fair minded exclusion of a bidder on grounds of non-responsiveness in one context may not be regarded as fair in a different context. Judicial utterances on the issue of bid responsiveness must therefore be understood within the factual matrix of each decided case. What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

57. Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[39] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[40] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.[41]The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

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

*59.* It is common ground that the third Respondents bid was evaluated and found to be un responsive. The third Respondents position is that it was the lowest, hence it ought to have been considered. But there were other considerations too which led to the disqualification. The requirement of rationality is to ensure that the action is not arbitrary or capricious and that there is a rational connection to the facts and the information available to the administrator taking the decision and the decision itself. Rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. By basing its decision on the position that the price quoted was the lowest and ignoring the other relevant considerations including the capacity to perform and the tender requirement that the award be made to more than one firm, the Review Board acted arbitrary and went against the express requirements of the tender documents. It also assumed the role of the evaluation committee if not that of the procuring entity. For a decision to be justifiable, it should be a rational decision taken lawfully and directed to a proper purpose.[42]

60. The constitutional and legislative procurement framework entails prescripts that are legally binding. The fairness and lawfulness of the procurement process and the decision under Review must be assessed in terms of the provisions of the Fair of Administrative Action Act.[43]The proper approach for this Court in Reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of Review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under Fair Administrative Action Act[44] has been established.

*61. By purporting to evaluate and determine the Responsiveness of the Bid by the third Respondent, the Board acted unfairly and in excess of its powers in that it encroached into the mandate to the Tender Evaluation Committee. Such an irregularity is fundamental and taints the decision. The decision* ignored clear terms of the tender documents, such as the requirement that the Tender was to be awarded to more than one bidder, a matter which a Tribunal properly exercising its mind to the facts could not ignore. Alternatively, had the Review Board properly addressed its mind on the issue, it could have arrived at a different decision.

***c. Whether the Interested Party's Request for Review was time barred, and, if not, whether the Interested Party's Request for Review was competent.***

62. **Mr.Gatonye** argued that even if the third Respondents letter dated **29th** Janaury,2018 was to be treated as a request for review, the same was filed outside the **14** days as mandatorily provided for under section **167(1)** of the Act. He argued that the Bidder having admitted receipt of the notification on the **21st** December, 2017 it could only file a review application within **14** days *i.e.* by latest **4th** January, 2018. He cited *Republic vs Public Procurement Administrative Review Board & 2 Others**[45]*** where the Court 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 Board acted outside its jurisdiction by hearing the matter which was filed after 7 days from the date of the notification of the results of the tender. By doing so, the Board engaged in a futile exercise which amounts to nothing."[Underlining ours]"*

63. He also cited *Republic vs Public Procurement Administrative Review Board & 2 Others*,[46] where the High emphasized that the timelines in the Act were set for a purpose. 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. He also argued that the Board itself has been very consistent in downing its tools when faced with applications filed outside the statutory time. He referred to *Geomaps Africa Limited –vs- National Land Commission*,[47] where the Board emphasized the issue of timelines and vigilance of the bidder upon tendering stating at **page 21** that:-

> "*The time framework (under the Act) does not permit the exclusion of holidays or any other period of time unlike in other statutes. That being the case, the Applicant's Request for review was filed (8) days out of time.*

64. **Mr. Moenga** cited Section **167 (1)** of the Act which provides that *"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review **within fourteen days** of notification of award or date of occurrence of the alleged breach at any*

*stage of the procurement process, or disposal process as in such manner as may be prescribed."*

65. He argued that the jurisdictional issue here is twofold. *First*, he argued, the fourth Respondent never filed a Request for Review on time, despite the letter of notification being duly dispatched on **5th** February 2018. *Second*, he argued, that the third Respondent was duly notified that its bid was unsuccessful vide a letter dated **5th** December 2017, and, that the third Respondent did not move the Board at all, but despite this, he argued, the Review Board proceeded to entertain the Request for Review. He argued that by rejecting the date submitted by the second Respondent as date of notification yet fail to address itself as to when then the third Respondent received the notification, the Board effectively found a way to arrogate itself jurisdiction by craft.

66. He also argued that the Review Board proceeded to entertain a "further Request for Review" by the third Respondent which was in the form of a letter a letter dated **29th** January 2018; which letter was not a Request for Review, and in any event, the third Respondent's own admission at page **185** of the Applicants' bundle that they received a regret letter on **21st** December 2017, hence, he argued, it had no right of audience before the Review Board to seek a relief after the lapse of **14** days. He submitted that in treating a letter as a request for review, the Review Board acted *ultra vires*. He referred to Section **167 (1)** of the Act which makes it clear that a candidate or a tenderer, who claims to have suffered or risks suffering, loss or damage may seek administrative review within fourteen days of notification of award.

67. **Mr. Odhiambo** for the first Respondent submitted that under looking at the provisions of section **167(1)** of the Act, it is clear that a candidate or tenderer aggrieved by an act or the decision of the procuring entity may seek a review within **14** days of notification of the award or occurrence of a breach. This, he argued, necessitates the determination of the question as to whether the Board's decision on this question was within its jurisdiction and whether it correctly determined it. He argued that it was impossible to correctly determine when time started running to arrive at a conclusion that the request for review was filed outside the limitation period provided under the Act.

68. **Mr.Kimani** argued that:- ***(i)*** *the question is whether the third Respondent was notified for time to start running;* ***(ii)*** *the burden of proving when the bidders were notified lay with the procuring entity;* ***(iii)*** *where service is disputed, the burden of proving that a notification was given lies with the procuring entity*.,[48] and *(iv) the Board failed to discharge this burden, having failed to discharge when the letters were sent.*

69. Regulation **73** of The Public Procurement and Disposal Regulations, 2006 provides that:-

> *1) A request for review under the Act* ***shall*** *be made in Form RB 1 set out in the Fourth Schedule to these Regulations.*
>
> *2) The request referred to in paragraph (1)* ***shall****-*
>
> *a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;*
>
> *b) be accompanied by such statements as the applicant considers necessary in support of its request;*
>
> *c) be made within fourteen days of-*
>
> *(i) the occurrence of the breach complained of where the request is made before the making of an award; or*
>
> *(ii) the notification under sections 67 or 83 of Act;*
>
> *d) be submitted in fifteen bound copies and a soft copy, pages of which* ***shall*** *be consecutively numbered****;***
>
> *(e) be accompanied by the fees set out in Part II of the Fourth Schedule which* ***shall*** *not be refundable.*
>
> *3) Every request for review* ***shall*** *be filed with the Secretary of the Review Board upon payment of the requisite fees.*
>
> *4) The Secretary* ***shall*** *acknowledge filing of the request for review.*

70. It is important to point out that the word ***shall*** is used in section 73 (1), (2), (3) & (4) cited above. According to *Black's Law Dictionary*, the term ***"shall"*** is defined as follows:-

> *"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."*

71. The definition goes on to say *"but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense." So "shall" does not always mean "shall." "Shall sometimes means "may*."

72. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to

their directions.[49] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[50] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

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

74. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.[51] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.[52]

75. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[53] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[54]

76. Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. Discussing the use of the word shall in statutory provision, Wessels JA laid down certain guidelines:-

> "*…. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…**[55]** - Standard Bank Ltd vs Van Rhyn (1925 AD 266).*

77. The above being the clear prescriptions of what constitutes a form of Request for Review, it cannot be said by any stretch of imagination that that the third Respondent's letter was a competent Request for Review. It is a requirement that a Request for Review must state the reasons for the complaint, including any alleged breach of the Act or the Regulations. It must be accompanied by such statements as the applicant considers necessary in support of its request. Such statements would in my view enable the opposite party to adequately respond to the claim. It will enable the Board to frame issues for determination. The party Requesting for Review is required to pay the requisite fees. None of these requirements were preset. For the Board to treat a letter as a request for Review, it clearly ignored the above express legal requirements, hence, its decision is tainted with illegality.

78. Section **169** of the Act empowers the Review Board Secretariat to reject a request for a review where no appeal fees is paid within the prescribed time. This section underscores the importance of a Request for Review to be properly filed and paid for. The letter relied upon cannot in my view qualify to be a competent Request for Review.

79. It is settled law that Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the same is grounded on law or the regulations. Put differently, it must be demonstrated that the challenged decision has foundation in law. Discussing the principle of legality, the South African court in the case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* stated as follows:-

> "*(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[56]***

80. It has by now become axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only.[57] The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful.[58]A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational.[59]

81. Even if we were to treat the said letter as a Request for Review, (which I am unable to as explained above) it is my view that a simple calculation of the dates from the date of the notification leaves me with no doubt that it was filed outside the stipulated period of **14** days, hence, the Board acted in excess of jurisdiction by cancelling the award and awarding it to a party who had not filed a Review within the set period. The Boards powers under section **173** of the Act cannot in my view cure such an omission. To hold otherwise would in my view amount to unduly straining the said section to achieve a meaning it does not bear or was not intended to bear.

82. The Boards wide powers under section **173** of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section **173** where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this Court to invoke its Judicial Review Powers. I agree with **Mr. Moenga's** submission that the Boards' powers of Review can never extend to the Board entertaining "informal" Requests for Review, creating issues *suo moto* and proceeding to determine the same.

83. On the face of clear provisions prescribing the form and contents of a Request for Review, I find and hold that it is act of bad faith for

the Review Board to admit a letter and treat it as a Request for Review. The test here is whether the Review Board would have arrived at the same decision if it had properly addressed its mind on the question whether or not the letter before it was a competent Request for Review as required under the law, which to me was a relevant consideration.

84. Decision-makers should not pursue ends which are outside the ‘‘objects and purposes of the statute.’’ It is said that power should not be ‘‘exceeded’’ or that the purposes pursued by the decision-maker should not be ‘‘improper,’’ ‘‘ulterior’’, or ‘‘extraneous’’ to those required by the statute in question. It is also said that ‘‘irrelevant considerations’’ should not be taken into account in reaching at a decision.

***d. Whether the Review Board's decision is unreasonable in that it directed the ex parte applicants to pay claims which had been made and refund the rest of the money/premium*.**

85. **Mr. Gatonye** submitted that the impugned decision is unreasonable in that the Review Board ordered the *ex parte* applicants to pay claims which had been made and thereafter refund the rest of the money/premium. He also argued that the order did not mention the costs already incurred by the Applicants.

86. **Mr. Moenga** argued that the Board cannot annul a contract on one hand and on the other hand direct the parties to perform the terms therein and pay claims. He submitted that this was an act so unreasonableness that no sensible person applying his mind to the facts can arrive at the same decision. He argued that the decision is irrational, unreasonable and it ignored public interest.

87. **Mr. Kimani's** argument on this point as I understood it is that the *ex parte* applicants will have earned interests on the premiums paid, hence they would not be prejudiced.

88. The question here is the reasonableness of the decision. It is admitted that the contract had been signed, premiums had been paid and the cover for the over 269,000 civil servants was in force. It is also stated that some claims had been lodged and were being processed, while others are pending and more are anticipated. The *ex parte* applicants were ordered to tabulate what has been claimed and paid and refund the balance. The rationale and reasonableness of such decision is now under challenge.

89. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano**[60]*** the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> *a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal".** Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*
>
> *c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute **'irrationality"** or **'perversity'** on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**[61]**:-*
>
> > *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

90. The first element of a reasonable administrative decision is rationality, and the second is proportionality. Rationality means that evidence and information must support a decision an administrator takes. Hoexter[62] explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects.

91. No single meaning can be attributed to reasonableness.[63] However, it is uncontroversial today that the first element promised by "reasonable" administrative action is rationality. This means in essence that a decision must be supported by the evidence and information before the administrator as well as the reasons given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. **Asimow** suggests that "after examining the evidence that both supports and opposes the agency decision, a court must conclude that a reasonable person could have arrived at the agency's conclusion."[64] The key question is whether there is a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at.

92. Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut.[65] Its purpose is to avoid an imbalance between the adverse and beneficial effects . . . of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end.[66] Two of its essential elements, then, are balance and necessity, while a third is suitability – usually referring to the use of lawful and appropriate means to accomplish the administrator's objective.

93. It is my view the order requiring the *ex parte* applicants to process the already paid claims and refund the balance cannot pass the above tests of **illegality, fairness, irrationality** and **proportionality**. *First,* it is common ground that a contract had been signed, the premium had been paid and the cover was already in force. *Second,* it is also common ground that some claims had been presented while others were pending or likely. The Review Board was under a duty to consider arriving at a less drastic decision as opposed to decision that would prejudice the insured persons and the parties to the contract. The right to reasonable administrative action is an essential element of our

transformed administrative law and of our constitutionalism more broadly.

***e. Whether the Review Board acted illegally by failing to consider Public Interest.***

94. **Mr. Gatonye** argued that the Review Board failed to consider/ignored relevant factors in arriving at its decision, e.g. the immense public interest premised on the social benefits to the insured persons which outweighs the private commercial interests pursued in the Review Application, the capacity of one bidder to underwrite alone, and the fact that the contract having been signed and premium paid, effectively placing on cover over 256,029 civil servants, the sudden cancellation of the contract presented risk loss and adverse exposure to the insurers and the insured persons.

95. **Mr. Moenga** supported the above submission and argued that the Board failed to consider relevant factors, among them public interest[67] hence the decision arrived at is unlawful.[68]

96. ***Mr. Odhiambo*** cited Article **227** of the Constitution and argued that the Board in its decision addressed the question of public interest at page **42** to **48** extensively and declined the invitation to uphold the decision of the procuring entity on the ground of public interest. He invited the Court to consider *Medical Laboratory Technicians & Technologists Board & another Ex Parte Elizabeth Wairimu Gichimba t/a Kenyatta Road Medical Laboratory****[69]***where it was stated:-

> *49. Public interest however is just like public policy. Whereas the Courts have recognized that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, and when you get astride it, you never know where it will carry you.* ***See Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.***
>
> *50. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR thus:*
>
> "*There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."*
>
> *51. In my view the rights and fundamental freedoms enshrined in the Constitution cannot be shoved aside simply because public authorities and bodies believe that they are acting in the public interest. The public interests and the rights and fundamental freedoms must be balanced so as not to sacrifice such rights and freedoms at the altar of what public authorities and bodies perceive to be public interests. As I have held hereinabove, the burden is upon the authority to justify taking an action in breach of rules of natural justice"*

97. He also submitted that the Board considered and concluded that the procurement in question was not fair and would lead to misuse of public resources to the tune of **Kshs. 40** million being the price difference between the lowest evaluated bidder and the successful bidder, and that Public interest militates against awarding a tender at an extra cost of **Kshs.40** million, hence, the decision cannot therefore be said to be so irrational or unreasonable.

98. In *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance(NASA) Kenya & 6 others****[70]*** the Court of Appeal observed:-

> *107. Since time immemorial, it has been said over and over again that public interest is an unruly horse. When you ride it, you never know where it will take you. It can take you to the sea or desert or on fertile land. Public interest changes with time and circumstances, it is always in flux and largely depends on who defines it. It is debatable whether it is objective or subjective. It can never be precisely defined, visibly identified or vividly noticeable. Be that as it may, in* ***Republic -v- County Government Of Mombasa ex parte Outdoor Advertising Association Of Kenya*** *[2014] eKLR it was held:*
>
> "*There can never be public interest in breach of the law.....because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution."*
>
> *108. In Republic -v- Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunications PVT Limited [2014] eKLR, it was expressed:*
>
> "*We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum…"*

99. It is not the task of the courts to substitute its judgment for that of the decision maker and accordingly, the courts will only interfere on a matter of reasonableness when the claimant is able to provide a strong clear case. Reasonable is not the same as saying [a] decision must be absolutely correct or that the Court would necessarily have made the same decision. It means that in making the decision you must apply logical or rational principles. If a decision is challenged, the Court will examine the decision to see whether it was made according to logical principles, and will often expressly disavow any intention to substitute its own decision for that of the decision maker.

100. It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interest to qualify as a public law issue. It seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity.[71]

101. The above test is potentially very broad in its reach and has been used by the courts on a number of occasions. For instance, in *Re Kirkpatrick's Application*,[72] the High Court in Northern Ireland held that:- "*the public has a legitimate concern as to how … an important natural resource would be controlled by a public agency accountable to government and ultimately the public."*

102. The above test was used *Re City Hotel (Derry) Ltd's Application.**[73]*** These cases are noteworthy not just because they have marked an expansion of judicial review into new types of disputes but also because they have seen the courts elaborate upon the nature of the "public interest" that arose on the facts. The standards of review involved here is determining the correctness and reasonableness of the decision. Correctness applies to procedural fairness, constitutional questions, legal questions of general importance, and jurisdiction questions. Reasonableness applies to questions of fact, questions of mixed fact and law. A reasonable decision is supported by evidence and reasons. In my view, the reasonableness of the impugned decision putting into a jeopardy public insured under the subject insurance was a relevant consideration and a matter of public interest which could have influenced the decision had the Review Board brought it into full view.

***f. Whether the Board acted illegally by ordering the procuring entity to award the Tender within seven (7) days.***

103. **Mr. Gatonye** argued that the Board's decision was made in contravention of the law/error of law in that the Board ordered the procuring entity to award the tender to the third Respondent within **seven (7) days** in contravention of section **175(1)** of the Act which entitles the *ex parte* Applicants and/or other aggrieved parties to seek redress in the High Court within fourteen **(14)** days from the date of the decision.

104. **Mr. Moenga** submitted that it was an act of bad faith for the 1st Respondent to direct the 2nd Respondent to award the tender to the 3rd Respondent within seven **(7)** days in contravention of the express provisions of section **175 (1)** of the Act and failed to furnish the applicant with the proceedings within the timelines, hence frustrated their attempts to challenge the decision. He cited *Republic vs Public Procurement Administrative Review Board Ex parte Kenya Ports Authority Limited & 2 others**[74]*** where the Court found similar conduct unacceptable and stated-

> *94." As the Respondent Board has continuously adopted a practice of not furnishing parties with its proceedings expeditiously in violation of Article **47** of the Constitution and as there is no reason advanced in the instant case for such a delay, I find that the Respondent by its conduct violated the ex parte applicant's rights under Article 47 of the Constitution. Such conduct cannot be countenanced by a public body that is established to promote principles of maximisation of economy and efficiency, promotion of competition and fairness, increment of transparency, accountability and public confidence. Whereas occasional delays in furnishing reasons for the decision may be excused, such justification must be on a case to case basis and cannot be treated as the general rule as has become routine in matters before the Respondent Board."*

105. He argued that it was a clear error of law to direct the second Respondent to award the tender to the third Respondent within **7** days contrary to the express provisions of section **175 (1)** of the Act, a clear error of law amounting to illegality as defined in *Pastoli vs Kabale District Local Government Council & others.*[75]He also argued that the decision contravenes the constitutional and legislative objective of public procurement.

106. **Mr Odhiambo** citing section **175(1)** of the Act[76] argued that the directive did not in any way limit the time for lodging an application for judicial review, but only directed the procuring entity to act within **7** days. In any event, he argued, the *ex-parte* applicant was at liberty to challenge the directive within **14** days, and that the directive was issued within the confines of section **173** of the Act.[77]

107. Section **175(1)** of the Act provides for the Right to Judicial Review to procurement in the following words. ***(1)*** *A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties. In my view, the Boards order directing the procuring entity to award the contract within **7** days flies on the face of the above provision.*

108. It is my view that Section **173** which provides the powers of the Review Board cannot be read in isolation. A holistic reading of the Act is necessary. All relevant provisions of the Act must be brought into view and construed together. Section **173** of the Act cannot be read in isolation and ignore Section **175 (1)** which provides for the Right of Review within **14** days. The question is, why limit the period to seven **(7)** days in total disregard of the clear provisions of Section **173** of the Act?

109. *In construing a statute, it is important to bear in mind* the contextual scene. The importance of context in statutory interpretation was underlined by Schreiner JA.[78] It is necessary to add that the contextual scene has an even deeper significance in our constitutional democracy. All law must conform to the Constitution and be interpreted and applied within its normative framework.[79] The Constitution itself must be understood as responding to our painful history and facilitating the transformation of our society. Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated in Article **10** of the Constitution and the Bill of Rights. The Right to access the Court is enshrined in the Constitution in Article 10. Thus, a decision limiting the Right to approach as in the impugned order which has the effect of reducing the right to Request for Review from **14** to **7** days cannot pass the constitutional muster.

110. Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution.

111. The provisions of the statute in question must be read in the context of not one but three different imperatives. The *first* is to enable the Review Board to effectively to carry out its specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for the Review Board to resolve disputes through the application of the law. *Second,* the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the decisions of the Review Board affects the *ex parte* applicants, the Review Board is obliged not to act unfairly. The act must accordingly be construed so as to promote respect for the Bill of Rights. A *third* dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a Court or if appropriate another independent and impartial tribunal or body.[80]Put differently, it could not have been the intention of the legislature to contemplate a situation whereby the Review Board would act in such a manner as to limit a party's right to approach the High Court for Review within **14** days.

112. In view of my conclusions herein above, it is my finding that the order that the award be made within **7** days is illegal to the extent it limits or had the potential of limiting the *ex parte* applicant's Right to Request for Review within the statutory guaranteed period of **14** days.

***g. Whether the Review Board acted illegally in failing to invite the parties to present arguments as to why the third Respondent was disqualified by the Procuring Entity.***

113. **Mr. Gatonye** submitted that before purporting to annul the tender award the Review Board failed to invite, hear arguments and consider specifically why the Bid by the third Respondent was disqualified by the Procuring Entity and whether in the circumstances of the Review Application No.**11** of 2018 filed by CIC Life Assurance Limited, it was open for the Review Board to award a tender to a bidder who opted not to pursue a Review. He cited *Republic vs Public Procurement Administrative Review Board & 2 others Ex- Parte Akamai Creative Limited*[81] where the High Court stated:-

> "**…***where the Board finds that a particular clause in the tender document is vague, it is not for the Board to substitute that clause with its own view of what ought to have been contained in the tender document. The best option is for the Board to remit the tender back to the procuring entity with appropriate directions*. *That was the position adopted by the Court in JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others(supra) where it was held that:*
>
> "*If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender."*
>
> *Therefore if the Board found that the clause in the tender dealing with the survey on the prevailing market prices was vague, one wonders on what basis it proceeded to award the subject tender to the 2nd interested party. Such decision can, as rightly contended by the Applicant, be termed as being Wednesbury irrational as there is not rational basis upon which such a decision could be arrived at."*

114. **Mr. Moenga** submitted that the second Respondent was not invited to comment on why the third Respondent was disqualified[82] hence, he argued, the decision was made in excess of jurisdiction, arbitrary, unfair, irrational, unreasonable, made without taking into account relevant factors and *ultra vires* its powers as outlined under the Constitution and the Act, its decision is amenable to judicial review.

115. Counsel for the first and third Respondents did not address this specific issue. However, as I found herein above, the third Respondent wrote a letter as opposed to a Request for Review. The parties as expected addressed the issues presented by the principal parties in the Request for Review before it. The determination in favour of the third Respondent, an Interested Party, was premised on issues not presented by the principal parties and on issues the principal parties were not invited to respond to. To me, this is a clear violation of the principles of natural justice.

116. The *first* pillar of natural justice, --the hearing rule --requires that people whose rights, interests and expectations may be affected by a decision should be given sufficient prior notice and an adequate chance to be heard before any decision is made. The bias rule is the *second* pillar. It requires that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice.

117. That apart, a person or a body must have a legal right or right in law to defend or assail. I find it useful to quote the principle of natural justice as enunciated by the Supreme Court of India in *Canara Bank vs. Debasis Das*.[83] I may profitably reproduce the same here below:-

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

And again:-

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

*recognized by all civilized States is of supreme importance....”*

118. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. Perhaps I should add that the principles of natural justice are now entrenched in the Constitution. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[84] Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*

119. Briefly, this means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects them in a negative way. Lawful means that administrators or decision makers must obey the law and must be authorized by law to make the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act[85] sets out procedures that administrators must follow before they make decisions.

120. As the Supreme Court of Appeal of South Africa observed[86] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory and quasi-judicial bodies. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution.

121. The moment the Review Board opted to treat a letter written by an Interested Party as a "Request for Review," (which was wrong), then it ought to have given notice to all the parties affected or likely to be affected by the decision to file their "Responses on the Request for Review" and adduce evidence or submissions as may be necessary. This is because the moment the Review Board opted to treat the said document as a pleading, then the rules and procedures governing conduct of judicial proceedings applied. Thus, the award flowing from the said letter is in my view a product of a proceeding that was conducted contrary to the law. Thus, the impugned award was vitiated by the said illegality.

***h. Whether the Review Board acted unreasonably by annulling a contract that had been already signed and performance began.***

122. Counsels for the *ex parte* applicants and the second Respondent faulted the Review Board for failing to consider that a contract had been signed and performance had began. They argued that the decision was made in excess of jurisdiction, was arbitrary, unfair, irrational, unreasonable, and was made without taking into account relevant factors. They argued that it was *ultra vires* the powers of the Review Board outlined in the Constitution and the Act, hence, the decision is amenable to judicial review.

123. In response, **Mr.Odhiambo** cited *Lordship Africa Limited vs Public Procurement Administrative Review Board & 2 others* [87] where it was held that the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review and that the Board has the duty to investigate whether the contract in question was signed in accordance with section **135** of the Act.

124. **Mr. Odhiambo** submitted that it is not enough for a party to merely state that a contract had already been signed, but, the Review Board is duty bound to examine whether the contract was signed in accordance with the law. He submitted that the Review Board made a finding that there was no proper notification of bidders in line with section **87(3)** of the Act. Consequently, he argued, it would naturally follow that in the absence of proper notification, it was impractical to determine when the provisions of section **167(1), 167(4)(c)** as read with section **135(3)** of the Act were adhered to. He argued, that the contract cannot be said to have been signed within **14** days of notification where the notification was not done in accordance with section **87(3).** He submitted that, any contract signed in flagrant disregard of the provisions of sections **87(3), 135(3), 167(1), 167(4)** of the Act is unreasonable, illogical and illegal and courts cannot be used to sanitize actions founded on illegalities.

125. **Mr. Kimani** argued that a procuring entity which fails to serve one party or any of the bidders with a letter of notification cannot be heard to state that since a contract has been entered into, the aggrieved party is then left without a remedy and that a court of law cannot sanction what was illegal or enforce obligations arising out of an illegal transaction.[88] He argued that the signing of the contract could not have divested the board the jurisdiction since notification of bidders was vital.

126. As stated earlier, the administration of justice is highly contextual and fact sensitive. Here is a situation whereby the contract tender was awarded. The contract was signed and payment made. There is evidence of performance of the contract. The contract relates to a massive insurance covering over 269,000 civil servants. Some claims have been made. Others are pending or expected. Section **135** of the Act stipulates that:-

*Creation of procurement contracts.*

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

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

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

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

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

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

*(a) Contract Agreement Form;*

*(b) Tender Form;*

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

*(d) Schedule of Requirements;*

*(e) Technical Specifications;*

*(f) General Conditions of Contract;*

*(g) Special Conditions of Contract;*

*(h) Notification of Award.*

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

127. I am conscious of the fact that I am not required delve into the evidence. But my reading of the above section leads me to the conclusion that had the Review Board carefully applied its mind to the above section and the facts, its conclusion could have been different, that it, a reasonable Tribunal could have easily concluded that the contract was signed in accordance with section **135** of the Act. In other words before the Review Board makes a determination that it has jurisdiction to entertain the request by virtue of section **167(4)(c)** of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section **135** of the Act and failure to take into account all the relevant material is in my view improper exercise of jurisdiction. In any event, the terms of tender documents were that the contract was to be awarded to more than one bidder. By awarding it to one bidder, the Review Boarded acted contrary to the tender terms or ignored the tender terms.

***j. Whether the ex parte applicants are seeking a merit Review as opposed to a Judicial Review.***

128. **Mr. Gatonye** submitted that Judicial Review is no longer restricted and predicated on just the common law principles of *ultra vires,* illegality, irrationality and procedural impropriety. He cited *Super Nova Properties Limited & Another vs The District Land Registrar, Mombasa & 2 Others**[89]*** in which the Court stated:-

*"…we find no fault that the judge expanded the grounds for judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity. The test of proportionality would automatically lead to a greater intensity of review of the merits as it invites the Court to evaluate the merits of the decisions, by assessing balance to make, that is whether the decision to be made is within the range of rationality or reasonableness. Secondly, the proportionality test may go deeper into examination of the interests of those to be affected by the said decision."*

129. He also cited the Court of Appeal decision in *Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others*[90]where it was stated:-

*"the test of proportionality leads to a "greater intensity of review" than traditional grounds. What this means in practice is that consideration of substantive merits of a decision play a much greater role. Proportionality invites the Court to evaluate the merits of the decision; first, proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to with that the limitation of the rights is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory Judicial Review applications."*

130. **Mr. Moenga** supported **Mr. Gatonye's** submissions. He cited *Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others**[91]*** and argued that judicial review principles and parameters have evolved over time. He also cited *Child Welfare Society of Kenya vs Republic & 2 others Ex-parte Child in Family Focus Kenya* [92] whereby it was held that Constitution of 2010 has elevated the

process of judicial review to a pedestal that transcends the technicalities of common law. In the said case, the Learned Judges were categorical that the dynamism of society and the events of recent history have decidedly thrust Judicial Review into a whole new trajectory thus expanding the limits of judicial review, and that section **11** of the Fair Administrative Action Act[93] has widened the scope of the orders that a court may grant in judicial review matters, including, declaring the rights of the parties in respect of any matter to which an administrative action relates.[94] He further argued that where a decision is arrived at contrary to statutory provisions or without jurisdiction, an order of *certiorari* would issue to quash the decision. He cited *Republic vs Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another**[95]*** in which it was stated thus:-

> "*The reach of judicial review is now well established. In the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935**Lord Diplock summarized the scope of judicial review thus:-*
>
> "*Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action are subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..*
>
> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
>
> *By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"*
>
> *(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.*
>
> *I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."*
>
> *In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means least he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in **GRAIN BULK HANDLERS LIMITED V J. B. MAINA & CO. LTD & 2 OTHERS [2006] eKLR** summarized the purpose of judicial review by stating that:-*
>
> "*Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."*
>
> *From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited**CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**case, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable."*

131. He also cited *Pastoli vs. Kabale District Local Government Council and Others***,[96]** in which the Court citing *Council of Civil Unions vs. Minister for the Civil Service**[97]*** and **An** *Application by Bukoba Gymkhana Club**[98]*** that:-

> "*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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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."*

132. **Mr. Odhiambo** argued that the Review Board properly exercised its jurisdiction and arrived at a reasonable conclusion the finding cannot be deemed to have been made in excess of jurisdiction, irrational, *ultra vires* or unreasonable.

133. **Mr. Kimani** submitted that the *ex parte* applicants are seeking a merit review[99] and that the application does not meet the threshold for grant of orders of *certiorari.* He also submitted that these proceedings are of the nature of an appeal, that this court has no jurisdiction to engage in merit appeal.[100]

134. There is a long-established and fundamental distinction between an Appeal and Review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

135. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji:-**[101]***

> "*Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

136. **Lord Reid** in ***Animistic -vs- Foreign Compensation Commission[102]*** held that:-

> "***It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."***

137. An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me and my findings herein above, the conclusion becomes irresistible that the *ex parte* applicants have raised grounds for Review as opposed to any appeal. Accordingly, the argument that this is a merit review application fails.

***k. What are the appropriate orders in the circumstances of this case?***

138. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

139. The applicant also seeks an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

140. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

141. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[103] It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its

decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[104]

142. In view of my analysis and conclusions herein above, I find that the *ex parte* applicants have satisfied the threshold for this court to grant the orders sought. Accordingly, the *ex parte* Applicant's Application dated **12th** February 2018 is hereby allowed. Consequently, I grant the following orders:-

> *a) An order of Certiorari be and is hereby issued quashing the determination and orders of the Public Procurement Administrative Review Board (the first Respondent), delivered on the **2nd** February, 2018 in Public Procurement Administrative Review Application No. **11** of 2017.*
>
> *b) Further and or in the alternative and without prejudice to the generality of paragraph **(a)** above the decision and or the determination and orders of the Public Procurement Administrative Review Board, the first Respondent herein, rendered in Public Procurement Administrative Review Application No. **11** of 2017 on the **2nd** February, 2018 and all the consequential orders arising there from be and are hereby annulled and or set aside.*
>
> *c) An order of Prohibition be and is hereby issued prohibiting and/or restraining the second Respondent herein, the **National Hospital Insurance Fund** from awarding the tender and/or signing any contract with **M/s UAP Life Assurance Limited,** the third Respondent herein in respect of Tender No. **NHIF/017/2017-2018** For Provision of Group Life Cover and Last Expense For Civil Servants, National Police Service and Kenya Prisons Service for the Year 2017-2018 as ordered by the Board in its decision of **2nd** February, 2018;*
>
> *d) That the first and third Respondents shall jointly and severally pay the costs of these proceedings to the ex parte applicants.*

Orders accordingly.

**Signed, Delivered and Dated at Nairobi this 4th day of July, 2018**

**John M. Mativo**

**Judge**

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[1] Act No. 33 of 2015.

[2] Act No. 4 of 2015.

[3] See *Minister of Health and another vs New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

[4] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[5] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

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

[7] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[8] Lord Denning, *The Discipline of Law* ,1979 London Butterworth, at page 12.

[9] Act No. 33 of 2015.

[10] Counsel referred to *Balding vs British Transport Police* {1999}2AC 143 at 175 H.

[11] Counsel cited *R vs Public Procurement Administrative Review Board Ex parte Zhongman Petroleum & Natural Gas Group Company Ltd.* {2000}eKLR and *R vs Public Procurement Administrative Review Board & 2 Others ex parte Team Engineering SPA* {2014}eKLR.

[12] Counsel cited *R vs Public Procurement Administrative Review Board & 2 Others Ex parte Kenya Power & Lighting Co. Ltd.*

[13] {2016} eKLR

[14] Counsel cited *Republic vs Public Procurement Administrative Review Board & Another Ex parte Gibb Africa Ltd & Another* [2012] eKLR.

[15] {2014}eKLR.

[16] Ibid

[17] {1970} E. A. 470.

[18] Ibid.

[19] MANU/SC/0047/1967.

[20] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986.

[21] *Bhavnagar University vs. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59).

[22] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats vs University of Delhi & Anr.* (Citing Lord Denning).

[23] Ibid.

[24] Ibid.

[25] {2016} eKLR.

[26] See *Woods Manufacturing Co. vs The King* {1951} S.C.R. 504 at page 515 and *Youngsam R (On the Application of) vs The Parole Board* {2017}EWHC 729.

[27] *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others* {2017}eKLR.

[28] See *Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others* {2015} eKLR citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195.

[29] {2016} eKLR.

[30] {2015} eKLR.

[31] {2016} eKLR.

[32] {2016} eKLR.

[33] Under clause 4.4.2, it was provided that: The Insurer **MUST** have the capacity to underwrite Minimum lead of 40% of the policy awarded, as the Fund **SHALL** award **more than one** Underwriter but not more than Three Underwriters considering the Risk involved.

[34] Counsel referred to pages 35 and 39 of the Decision. Counsel also cited Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR, where the Learned Judges explained as follows:- The Board further found that the ex parte applicant was not an Original Equipment Manufacturer. From the decision of the Board it is clear that this term which became so crucial in the Board's determination was defined by the PE in the Tender Document. *However the Board in its decision adopted a definition other than the one in the bid document.* The Board therefore provided its own definition based on the submissions of one of the parties. Whereas we appreciate that the Board's latitude in applications for review is wide, *such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.*

[35] *Republic vs Public Procurement Administrative Review Board & 2 others Exparte Kenya Power and Lighting Company Limited* {2017}

eKLR cited.

[36] Peter Volmink, *Legal Consequences of Non Compliance with BID Requirements*, (2014) 1 APPLJ 41.

[37] Hoexter 2012: 295.

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

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

[40] Hoexter 2012: 295.

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

[42] *Bel Porto School Governing Body and Others vs. Premier, Western Cape* 2002 (3) SA 265 (CC) Chaskalson CJ , at para [89].

[43] Supra.

[44] Ibid.

[45] {2015} eKLR.

[46] {2015} eKLR.

[47] PPARB Application No.3 of 2015.

[48] *Republic vs Public Procurement Administrative Review Board & 2 Others Ex parte Seven Seas Technologies Ltd* {2015}eKLR.

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

[50] Ibid.

[51] Subrata vs Union of India AIR 1986 Cal 198.

[52] See *DA Koregaonkar vs State of Bombay*, AIR 1958 Bom 167.

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

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

[55] *Sutter vs Scheepers* 1932 AD 165, at 173 - 174.

[56] *AAA Investments (Pty) Ltd vd Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

[57] As Ngcobo CJ said in *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49

[58] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[59] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[60] JR No 17 B of 2015.

[61] {1948} 1 K. B. 223, H.L.

[62] Supra.

[63] See Anashri Pillay„ Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?? (2005) 122 SALJ 419 and I M Rautenbach„ The Limitation of Rights and “Reasonableness” in the Right to Just Administrative Action and the Rights to Access to Adequate Housing, Health Services and Social Security? 2005 TSAR 627.

[64] Asimow, citing *Universal Camera Corp vs NLRB 340 US 474* (1951) as the leading case. This test „does not allow a court to reweigh the evidence and overturn the decision merely because it prefers a conclusion different from the agency?s? (at 15).

[65] S v Manamela 2000 (3) SA 1 (CC) para 34; and see Jeffrey Jowell & Anthony Lester QC „Proportionality: Neither Novel nor Dangerous? in Jeffrey Jowell & Dawn Oliver (eds) New Directions in Judicial Review (1988) 51.

[66] Cora Hoexter "Standards of Review of Administrative Action: Review for Reasonableness" in Jonathan Klaaren (ed) A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy (2006) 61 at 64.

[67] Counsel cited *Kenya Hotel Properties Limited vs. Willisden Investments Limited & 6 others* [2013] eKLR.

[68] Counsel cited *Zachariah Wagunza & another vs. Office of the Registrar Academic Kenyatta University & 2 others* {2013} eKLR.

[69] {2015} eKLR

[70] {2017}eKLR

[71] Kerr J’s judgment in Re McBride’s Application [1999] NI 299, at 310

[72] {2003} NIQB 49.

[73] {2004} NIQB 38.

[74] {2017} eKLR.

[75] {2008} 2 EA 300

[76] Section 175. (1) provides that "A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties."

[77] 173 Powers of Review Board.

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

[78] In Jaga v Dönges, N.O. and Another, 1950 (4) SA 653 (A)

[79] See Article 259 of the Constitution.

[80] Article 50 (1).

[81] {2015}eKLR.

[82] Counsel cited *Republic vs Manager Mwea Irrigation Scheme & 3 others Ex-Parte Applicant David Gatuiku Ndubai* {2015] eKLR.

[83] {2003} 4 SCC 557.

[84]See *Onyango v. Attorney General*,[84] ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-"*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another,**[84]** at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

[85] Act No.4 of 2015.

[86]*Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO.* [2000].

[87] {2018} eKLR.

[88] Counsel cited Republic *vs Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Ltd* {2010}eKLR.

[89] Civil Appeal No. 98 of 2016.

[90] {2016}eKLR.

[91] {2016} eKLR.

[92] {2017} eKLR.

[93] Supra.

[94] Counsel cited Josephat Kiplagat v Michael Bartenge [2016] eKLR (**Maraga, Musinga & Gatembu, JJ.A.).**

[95] {2012} eKLR.

[96] {2008} 2 EA 300.

[97] {1985} AC 2.

[98] {1963} EA 478 at 479.

[99] Counsel cited *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR, *Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another* [2014] eKLR and *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 the Court of Appeal.

[100] Counsel cited *Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others* {2016} eKLR and *Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd* {2002} eKLR.

[101] {2014} eKLR.

[102] **{1969} 1 All ER 20.**

[103] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.

[104] See Patel vs Witbank Town Council 1931 TPD 284 Tindall J said (at 290).