



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 147 OF 2018

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

KENYA PIPELINE COMPANY LTD.....1ST INTERESTED PARTY

TRANSPower ENERGY SOLUTIONS LTD.....2ND INTERESTED PARTY

EX PARTE:

KROHNE (PTY) LTD

JUDGMENT

Introduction

1. The ex-parte Applicant herein, Krohne (Pty) Limited (hereinafter “the Applicant”), is a company incorporated in South Africa, while the Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes. The other parties to this dispute are the Kenya Pipeline Company Limited (the 1st Interested Party), which is a State Corporation established under the Companies Act; and Power Energy Solutions, (the 2nd Interested Party), which is a company registered under the Companies Act and carrying on business in Kenya.

2. On 16th May 2017, the 1st Interested Party advertised an open tender (No KPL/PU/028-OT/17) for the supply installation and commissioning of mainline the metering system with a closing date of 14th June 2017. The tender was opened on 14th June 2017, and nine bidders, including the interested parties; submitted bids. After the Preliminary Evaluation and Technical Evaluation, three of the bidders, including the Applicant and 2nd Interested Party, satisfied the technical requirements based on scores attained, and qualified to proceed to the Financial Opening, which subsequently took place on 7th September 2017.

3. The 1st Interested Party’s tender evaluation committee after deliberations recommended that the tender be awarded to the 2nd Interested Party, subject to carrying out due diligence on the said bidder by the 1st Interested Party. The due diligence exercise was duly carried out, and the tender evaluation committee submitted a report signed on 18th October 2017 indicating that the documents provided by the 2nd Interested

Party on certification were incomplete. The 2nd Interested Party thereupon lodged a Request for Review on 17th November 2017 (hereinafter “the First Request for Review”) with the Respondent, being Application No. 99 of 2017, seeking orders *inter alia* that the 1st Interested Party award the tender to the 2nd Interested Party.

4. By a decision made on 7th December 2017, the Respondent allowed the 2nd Interested Party’s Request for Review and directed the 1st Interested Party to complete the procurement in accordance with the law within fourteen (14) days. The 1st Interested Party General Manager Supply Chain thereafter reviewed the tender evaluation report, and provided the 1st Interested Party’s Accounting Officer with a professional opinion on the procurement proceedings dated 21st December 2017, pursuant to section 84 of the Public Procurement and Asset Disposal Act.

5. The 1st Interested Party thereupon proceeded to terminate the tender by way of a letter dated 21st December 2017 that was communicated to the bidders, on grounds of material governance issues that had been detected in the professional opinion. The 1st Interested Party’s decision prompted the 2nd Interested Party to file another Request for Review on 2nd January 2018, (hereinafter “the Second Request for Review”), being Application No. 01 of 2018.

6. The said Application was heard and a decision rendered on 22nd January 2018, by the Respondent wherein it declared the 1st Interested Party’s decision to terminate the tender as null and void. The Respondent further directed the 1st Interested Party to complete the procurement process in accordance with the law and the Respondent’s decision in Application No. 99 of 2017 within fourteen (14) days.

7. Subsequently, the 1st Interested Party in a decision set out in the letter dated 27th February 2018, notified the 2nd Interested Party that its tender was not successful due to lack of the “equivalent OIML R-117 Custody Transfer Type Approval from the country of origin” and that “the test reports from NMI and PTB which were not approved” were submitted by the 2nd Interested Party. The said letter further gave notification of the award to the Applicant.

8. The 2nd Interested Party once again lodged a Request for Review on 2nd March 2018, (hereinafter “the Third Request for Review”) with the Respondent, being Application No. 36 of 2018, challenging the decision of the 1st interested Party. The Respondent rendered its decision on the said Request for Review on 22nd March 2018, and *inter alia* declared the 1st Interested Party’s decision to award the tender to the Applicant null and void, and annulled the said award. The Respondent further awarded the tender to the 2nd Interested Party, and directed the 1st Interested Party and 2nd Interested Party to sign the resultant contract within a period of fourteen (14) days.

9. Being aggrieved by the Respondent’s determination, the Applicant has now approached this Court, through a Notice of Motion dated 18th April 2017, in which it seeks the following orders;

I. An Order of Certiorari to bring into the High Court for purposes of being quashed the decision of the Respondent delivered on the 22nd March 2018 in Application No. 36 of 2018 and in particular the following orders:

- a) *A declaration be and is hereby made declaring that the Respondent’s decision to carry out a fresh evaluation and thereafter award Tender No. KPL/PU/028-OT/17 to the interested party herein M/S Krohne Pty Limited is null and void.*
- b) *An order be and is hereby issued annulling the award of Tender No. KPL/PU/028-OT/17 to M/S Krohne Pty Limited the interested party herein as contained in the Procuring Entity’s letter of award dated 27th February 2018*
- c) *A declaration be and is hereby issued declaring that the Applicant submitted the lowest evaluated bid and was recommended for award of the tender by the tender evaluation committee on 18th October 2017;*
- d) *An order be and is hereby issued awarding Tender No. KPL/PU/028-OT/17 to the Applicant at the tender sum of Euros 2,998,553.88 (inclusive of taxes).*
- e) *An order be and is hereby issued directing the Procuring Entity and the Applicant to sign the resultant contract within a period of fourteen (14) days from today’s date.*
- f) *The Procuring Entity shall deposit the duly executed contract agreement between it and the Applicant with the Board within the said period of fourteen (14) days set out in order number (e) above*
- g) *Since costs follow the event, the Applicant is awarded costs of this Request for Review to be agreed or taxed.*

II. An Order of Prohibition restraining the 1st Interested Party from entering into a contract with the 2nd Interested Party over and/or concerning Tender No. KPL/PU/028-OT/17 for Supply, Installation and Commissioning of Mainline Metering System and/or based on the Respondent’s decision made on 22nd March 2018 in PPARB No. 36 of 2018.

III. Costs of this Application be provided for.

IV. Such other and further reliefs or orders as this Court may deem just and expedient to grant.

10. This Court directed the parties to file their respective pleadings and submissions on the said application, and at the hearing thereof held

on 30th July 2018, the counsel for all the parties submitted that they would rely on the same for this judgment. A summary of the parties' respective cases now follows.

The Applicant's Case

11. The Applicant relied on the statutory statement it filed dated 4th April 2018, and a verifying affidavit sworn on the same date by Manuel Monteiro dos Santos, its Development Manager, and the annexures thereto. The Applicant's Advocates on record, Iseme, Kamau & Maema Advocates, filed submissions dated 31st May 2018 in support of the application.

12. The Applicant detailed the tendering processes and the Request for Reviews made by the 2nd Interested Party that culminated in the impugned decision by the Respondent delivered on 22nd March 2018, that have been summarized in the foregoing. The Applicant averred that the Respondent reached the decision on the grounds that the preliminary, technical and financial evaluation had been finalized, and a recommendation had been made to award the tender to the 2nd Interested Party, and that the only remaining part of the process was the issuance of a letter of award.

13. Further, that the Respondent premised its decision on the ground that that it had not directed the 1st Interested Party to reconstitute the tender evaluation committee to re-evaluate the tenders which had already been evaluated, and that the reconstitution afresh of the tender committee was meant to tilt the process in favour of a particular bidder and circumvent due process. Lastly, that the Respondent found that the 2nd Interested Party had offered the lowest evaluated price as compared to the Applicant, and its tender was fully evaluated, and there could be no legal basis for setting aside the recommendation of award.

14. It is the Applicant's case that the Respondent made errors of fact and law in its findings, and acted in excess of jurisdiction for the following reasons:

a) Once the preliminary, technical and financial evaluation is completed, the tenders must still be subjected to due diligence under section 83 of the Public Procurement and Assets Disposal Act as read together with Clause 27 of the Tender Document, and receive a positive determination before a letter of award could be issued. In the circumstances, issuance of the letter of award was not the only remaining part of the procurement process in the matter.

b) The Respondent had no jurisdiction to exempt the 2nd Interested Party's bid from being subjected to the provisions of section 83 of the Public Procurement and Assets Disposal Act, as read together with Clause 27 of the Tender Document.

c) The Respondent had no jurisdiction to compel the 1st Interested Party to ignore the express provisions of section 83 of the Public Procurement and Assets Disposal Act as read together with Clause 27 of the Tender Document and issue a letter of award to the 2nd Interested Party.

d) Under section 83 of the Public Procurement and Assets Disposal Act as read together with Clause 27 of the Tender Document, the 1st Interested Party had the power to re-constitute the evaluation committee to undertake the due diligence for purposes of determining the 2nd Interested Party's qualification to supply the equipment satisfactorily.

e) The Respondent had no jurisdiction to determine that the 2nd Interested Party had offered the lowest evaluated price as compared to the Applicant, and its tender fully evaluated before being subjected to due diligence under section 83 of the Public Procurement and Assets Disposal Act as read together with Clause 27 of the Tender Document.

f) In the event the due diligence exercise resulted in a negative determination in respect of the 2nd Interested Party's tender, the 1st Interested Party was at liberty under Clause 27 of the Tender Documents to reject the tender and proceed to consider the second lowest tender. That in the circumstances, there is legal basis to set aside a recommendation of award which has not been subjected to due diligence under section 83 of the Public Procurement and Assets Disposal Act as read together with Clause 27 of the Tender Document;

g) In any event, a professional opinion under section 84 of Public Procurement and Assets Disposal Act had not been issued, and as such, there were several steps to be undertaken after the preliminary, technical and financial evaluation were completed.

15. Other grounds raised by the Applicant were that the Respondent's decision was procedurally unfair and in violation of rules of natural justice, as it made findings of misconduct on the part of the 1st Interested Party implying complicity and/or collusion with the Applicant herein, without according the Applicant a reasonable chance to be heard on those allegations. Further, the said allegations were not raised by any of the parties in their documentation. In addition, that the Respondent failed to consider the issues raised by the Applicant in its submissions nor to address them in its final decision, resulting in a miscarriage of justice;

16. The Applicant further alleged that the Respondent's decision is also vitiated by the biased manner in which the Respondent conducted the proceedings, as it proceeded to order and award Tender No. KPL/PU/028-OT/17 to the 2nd Interested Party, when the 2nd Interested Party had failed to submit a responsive tender which met all the eligibility and other mandatory requirements in the tender documents.

17. That the Respondent further acted in excess of its jurisdiction by entertaining the 2nd Interested Party's Request for Review, when the 2nd Interested Party had not met the criteria set out in Section 167(1) of the Public Procurement and Assets Disposal Act of 2015 and as such, there was no competent Request for Review before the Respondent for consideration premised on a responsive tender in compliance with the provisions of section 79 of the said Act.

18. The last ground was that the Respondents decision violated the provisions of Articles 10 and 201 (c) and (d) and 227(1) of the Constitution and is against the public interest, for the reasons that the Respondent ordered the 1st Interested party to execute a contract with the 2nd Interested Party in respect of a non- responsive tender which does not meet international certification criteria as set out in the tender. That the Respondent thereby exposed the Kenyan public to loss, as the efficiency and competency of the 2nd interested party's product which is the subject of the tender cannot be vouched for.

The Respondent's Case

19. The application was opposed by the Respondent in a replying affidavit sworn on 4th March 2018 by Henock K. Kirungu, the Secretary of the Public

Procurement Administrative Review Board. In addition, Emmanuel Bitta, a Deputy Chief State Counsel at the Attorney General's Chambers, filed submissions dated 26th July 2018 on behalf of the Respondent.

20. It is the Respondent's case that it rendered its decision and orders on the Third Request for Review on 22nd March 2018 after duly hearing the parties, and that its decision was not premised on errors of law as alleged. Further, that as is evidenced from its proceedings, the Respondent took into consideration relevant considerations, observed procedural propriety, acted within its jurisdictional competence, and was not biased against any party. Lastly, that its decision was reasonable and did not breach the Applicant's legitimate expectation.

The 1st Interested Party's Case

21. The 1st Interested Party's response to the application was in a Replying Affidavit sworn on 30th April 2018 by Gloria Khafafa, its Company Secretary. Its Advocates on Record, Robson Harris & Company Advocates also filed submissions dated 29th July 2018.

22. It is the 1st Interested Party's case that after the Financial Bids of the three qualified bidders were opened, its Evaluation Committee at a meeting held on 18th October 2017, deliberated on the Financial evaluation report and recommended that the tender be awarded to the 2nd Interested Party, which was subject to carrying out due diligence report on the Bidder by the 1st Interested Party, as per section 83 of the Public Procurement and Asset Disposal Act 2015.

23. Further, that through an email on 23rd October 2017, and based on section 88 of the said Act, the 1st Interested Party requested the bidders to extend the validity period for a period of thirty days so as to expire on 10th December 2017, and that the 2nd Interested Party through its letter dated 23rd October 2017 acceded to the request.

24. That pursuant to the provisions of section 84 of the Public Procurement and Asset Disposal Act, the 1st Interested Party's General Manager Supply Chain reviewed the tender evaluation report and provided a signed professional opinion to the 1st interested party's accounting officer on the subject procurement proceedings. The findings of the said professional opinion found that due to lack of submission by the 2nd Interested Party of mandatory requirements, it should have been disqualified at preliminary evaluation and should not have progressed to detailed technical evaluation, and that this raised material governance issues. The said General Manager Supply Chain thus recommended the termination of the subject tender pursuant to section 63 (1) (e) of the Public Procurement and Asset Disposal Act.

25. The 1st Interested Party accordingly terminated the tender and that the said termination was communicated to the qualified bidders on 21st December 2017 and the tender security returned to the respective bidders pursuant to the provisions of section 63(4) of the Act. Further, that this was also the reason why that the 1st Interested Party declared the 2nd Interested Party's bid to be unsuccessful. It was averred that the grounds upon which the tender was terminated were valid and the decision was in line with the procurement principles in Article 227 of the Constitution, and that the 1st Interested Party acting in compliance with section 88(3) of the Act. Furthermore that the tender validity expired on 10th December 2017, and pursuant to the provisions of section 87(1) of the Act, no award could thereafter be made.

26. It is thus the 1st Interested Party's case that the decision by the Respondent on 22nd March 2018 was made in error of the law and in disregard of the express provisions of section 88 of the Act, and that it failed to apply international based practices and norms pursuant to section 3(g) of the Public Procurement and Asset Disposal Act. Further, that the Respondent was in error in failing to find that the termination of the tender was in line with the provisions of the Public Procurement and Asset Disposal Act as read together with Article 227 of the Constitution.

27. Lastly, the 1st Interested Party averred that by allowing the 2nd Interested Party's Request for Review, the Respondent frustrated the legislative purpose for which it was established, and failed to give effect to fairness, equity, transparency and competition contrary to the provisions of Article 22 of the Constitution and section 3 of the Public Procurement and Asset Disposal Act.

The 2nd Interested Party's Case

28. The 2nd Interested Party's response was in a Replying Affidavit sworn on 30th April 2018 by its Director, Richard Gichuru; while A.E. Kiprono & Associates, its Advocates on record, filed submissions dated 2nd July 2018. The 2nd Interested Party confirmed that it participated in the 1st Interested Party's tender for the supply, installation and commissioning of mainline metering system, being Tender No. KPC/PU/028-OT/17, and that it filed the various Request for Reviews as explained earlier in this judgment.

29. Further, that it supports the Respondent's decisions, and stated that the Applicant has concealed from the court material facts that it

participated in all the Request for Reviews applications before the Respondent, and gave the particulars of such participation. In addition, that the Applicant had concealed that pursuant to questions raised by certain bidders, the 1st Interested Party issued two clarifications to the tender.

30. It was the 2nd Interested Party's case that the Respondent rendered its decision on 22nd March 2018 wherein it awarded the tender to the 2nd Interested Party, and directed the 1st Interested Party to sign the resultant contract within fourteen days. That after the lapse of the said 14 days on 6th April 2018, the 2nd Interested Party's legal counsel wrote to the 1st Interested Party's advocates, informing of non-compliance with the Respondent's decision. While awaiting the Respondent's response, the 2nd Interested Party instead obtained a copy of a letter dated 9th April 2018 from the Applicant's advocates addressed to the 1st Interested Party, and copied to themselves and the Respondent. The 2nd Interested Party averred that it has not had the opportunity to see the contents of the email of 5th April 2018, that was referred to by the Applicant in the said letter.

31. According to the 2nd Interested Party, the Technical Evaluation Committee report produced in proceedings before the Respondent by the 1st Interested Party shows that the 2nd Interested Party met all the eligibility and mandatory requirements and attained 100% on the technical scores, and that the financial report showed that, it had quoted the lowest price of Euros 2,998,553.88 inclusive of taxes, as opposed to the Applicants price of Euros 3,056,000.

32. Furthermore, that the issues of due diligence and eligibility of the 2nd Interested Party's bid are not issues that were before the Respondent in the Third Request for Review - Application No. 36 of 2018, and that the issues are therefore not properly before the court, as they do not emanate from the Respondent's decision in Application No. 36 of 2018. In any event, that the Respondent conclusively dealt with the said issues in the First Request for Review - Application Number 99 of 2017, and as neither the Applicant nor the 1st Interested Party challenged the Respondent's decisions in the First and Second Request for Reviews, under section 175 (1) of the Act the said decisions are final and this court does not have jurisdiction to review the said decision.

33. Specifically on the arguments made by the Applicant on the requirement for due diligence, the 2nd Interested Party contended that the Applicant's reference to the second evaluation as a due diligence exercise is misconceived, as a due diligence focuses on the successful bidder and not all who participated in the tender. That by engaging in an exercise that considered all the bids that had been submitted, the 1st Interested Party carried out a 2nd evaluation and not a due diligence exercise, contrary to the two decisions of the Respondent.

34. Further, that if the due diligence was mandatory as alleged, then the 1st Interested Party should have carried a due diligence exercise on the Applicant's bid, before making the annulled award to the Applicant. Therefore that the interpretation of law and facts by the Applicant is erroneous for the following reasons:

- (a) Section 83 of the Public Procurement and Asset Disposal Act does not make due diligence mandatory.
- (b) The Respondent did not compel and/or direct the 1st Interested Party to ignore the provisions of section 83 of the Act and only faulted the process adopted by the 1st Interested Party in carrying out the due diligence.
- (c) The 1st Interested Party did not have powers to re-constitute the evaluation committee to undertake due diligence on the 2nd Interested Party's bid, as the issue of due diligence had been dealt with conclusively by the Respondent in Application No. 99 of 2017.
- (d) Contrary to the Respondent's orders, the 1st Interested Party re-constituted the evaluation committee and proceeded to evaluate a fresh all the submitted tenders.
- (e) The 1st Interested Party's head of the procuring unit had given his professional opinion on the preliminary and technical evaluation stages of the tender to the 1st Interested Party's Managing Director, which opinion was approved by the said Managing Director before the financial evaluation of the three (3) successful bids.

35. The 2nd Interested Party refuted the allegations that the Respondent made any findings with regard to complicity or collusion between the 1st Interested Party and the Applicant, and stated that the Respondent merely made an observation in its decision to the effect that it was evident that the 1st Interested Party's actions were set out to tilt the process in favour of a particular bidder. The 2nd Interested Party however averred that the Applicant and 1st Interested Party are colluding to defeat the orders of the Respondent, as the 1st Interested Party was required to execute the contract by 5th April 2018 and did not comply, whereas the stay orders were granted by this Court on 9th April 2018.

36. In closing, it was the 2nd Interested Party's case that the Applicant has not demonstrated that the Respondent acted in excess of its jurisdiction, *ultra vires*, with bias, in violation of the rules of natural justice, in error of law or fact, or that the Respondent's decision is in violation of the Constitution. Further, that it was within the powers of the Respondent to substitute the 1st Interested Party decision with that of the Respondent in the Third Request for Review-Application Number 36 of 2018. Lastly, that the instant application is in the nature of an appeal, and not within the jurisdiction of the Court.

The Determination

37. The three main issues that arise from the pleadings and submissions filed by the parties are firstly, whether the Respondent's decision dated 22nd March 2018 was in error of law and/or *ultra vires* the Public Procurement and Disposal Act of 2015 (also hereinafter referred to

as “the Act”); secondly, whether the said decision by the Respondent was procedurally fair; and lastly whether the Applicant is entitled to the reliefs sought.

38. In dealing with the issues raised and the arguments made thereon, this court is reminded of the broad grounds in which it exercises its judicial review jurisdiction as stated in the case of **Pastoli vs Kabale District Local Government Council & Others** [2008] 2 EA 300 at pages 303 to 304 thus:

“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

39. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

40. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that while *Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.*

41. Before addressing the issues raised in this application, this Court needs to clarify that the Respondent’s decision that is being impugned in the present review proceedings is its decision on the Third Request for Review, that was delivered on 22nd March 2018. It is thus notable that the Respondent’s decisions on the First and Second Requests for Review are not the subject of challenge in the instant judicial review proceedings.

42. The Applicant in this regard submitted that the said decision of 22nd March 2018 was materially influenced by error of law for the reason that in its decision of 7th December 2017 in the First Request for Review, the Respondent nullified the due diligence report, and that by its decision of 22nd January 2018 on the Second Request for Review, the Respondent nullified the professional opinion dated 21st December 2017, on the basis of which the tender was terminated. It followed therefore that no award of tender could be made unless a new due diligence was done, and a professional opinion rendered.

43. Further, that the decision of the Respondent to award the tender to the 2nd Interested Party without requiring a new due diligence exercise to be conducted and/or by nullifying the re-evaluation done by the 1st Interested Party, was a misdirection of law, and the Respondent thereby failed to appreciate that due diligence was a mandatory requirement under section 83 of the Public Procurement and Assets Disposal Act as read together with Regulation 52 of the Public Procurement and Disposal Regulations, 2006 .

44. The Applicant urged that the Respondent erred in law in failing to appreciate that having nullified the termination of contract which was effected on the basis of the professional opinion dated 21st December 2017, the professional opinion was rendered null and void and as such, any subsequent process to award the tender was still subject to the requirement of a professional opinion under section 84 of the Public Procurement and Assets Disposal Act.

45. In addition, that the Respondent’s decision to award the 2nd Interested Party the tender and order the 1st Interested Party to execute a resultant contract was influenced by error of law, particularly in view of the findings by the 1st Interested Party’s evaluation committee that the 2nd Interested Party did not comply with the mandatory and technical tender requirements.

46. Reliance was placed on the decision in **Republic v Public Procurement Administrative Review Board & Anor Ex Parte University of Eldoret [2017] eKLR** where the court held that due diligence is an implied criteria in every tender document, and the Procuring Entity is under a public duty to carry out due diligence. The decisions in **Republic vs Institute of Certified Public Accountants of Kenya Ex Parte Joy Vipinchandra Bhatt T/A Jv Bhat & Company, (2008) eKLR** and **Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte International Research and Development Actions Ltd (2017) eKLR** were also cited for the position that errors of law and legal deficiencies in decisions are grounds for judicial review.

47. The Applicant also submitted that by making an award of tender to the 2nd Interested Party without satisfying itself that the provisions of sections 79, 83 and 84 of the Public Procurement and Assets Disposal Act, Regulation 52 of the Regulations and Clause 27 of Part B of the Tender Document had been complied with, the Respondent acted *ultra vires* as it had no power under the law for exempting the 2nd Interested Party's bid from those provisions.

48. Reliance was placed on the case of **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 others, (2015) eKLR** in which the court held that the Review Board committed an error of the law by completely failing to consider the criteria provided in the tender document.

49. Furthermore, that even if the Respondent found errors in the manner in which the Applicant was awarded its tender, the Respondent's power to substitute its decision for that of the Accounting officer of the 1st Interested Party under section 173(c) of the Public Procurement and Assets Disposal Act does not extend to situations where the Respondent disregards mandatory provisions of the Act. That what the Respondent ought to have done was to refer the matter back to the 1st Interested Party with appropriate directions. The case of **Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology [2016] eKLR** was cited in support of this submission.

50. The Applicant's submissions were reiterated by the 1st Interested Party, who cited the decisions in **Republic vs The Public Procurement Administrative Review Board ex parte Kenya Power and Lighting Company (2017) e KLR** and **Republic vs The Public Procurement Administrative Review Board and 2 Others ex parte Numerical Machining Complex Limited (2016) e KLR**, to submit that the Respondent's decision to substitute the decision of the 1st Interested Party and make an award in favour of the 2nd Interested Party was in breach of section 173 of the Public Procurement and Asset Disposal Act.

51. The Respondent on its part submitted that the grounds raised by the Applicant are seeking to challenge its prior final and binding decisions touching on the same procurement process, which is expressly barred by statutory limitation, and the Applicant passed the opportunity to raise any errors of law in the said decisions. Further, that the Applicant has avoided to address the issue of the reconstitution of the evaluation committee, which was the main reason behind the Respondent's decision that is under review.

52. In addition, that the Applicant has not disputed the finding by the Respondent that it is legally untenable to have two contradictory evaluation reports prepared by a procuring entity relating to the same tender. The Applicant also cited various judicial authorities on legitimate expectation, and contended that there was a legitimate expectation that its decisions would be complied with, and a legitimate expectation could not have accrued to the Applicant against specific statutory provisions of the Procurement Act.

53. The 2nd Interested Party on its part urged the Court to resist the invitation by both the Applicant and the 1st Interested Party to consider and/or address its mind to the issues dealt by the Respondent in the First and Second Requests for Review as neither the Applicant nor the 1st Interested Party challenged the Respondent's decision in the said Requests for Review. Further, that under section 175 (1) of the Public Procurement and Asset Disposal Act, 2015, the two decisions are final and binding upon all the parties, and this Court has no jurisdiction to entertain a challenge on the same at this point in time.

54. The 2nd Interested Party submitted that section 83 of the Act does not make it mandatory for a procuring entity to carry out due diligence., neither does Regulation 52 of the Public Procurement and Disposal Regulations, 2006 as the word "may" is used in the said section and regulation. Furthermore, that Clause 27 of the tender document made due diligence an alternative option in the absence of pre-qualification. The same therefore cannot be construed as being a mandatory requirement.

55. Further, that the issue of the requirements of OIML R-117 Custody Transfer Type Approval or its equivalent from the country of origin was not an issue before the Respondent in the Third Request for Review, and the Respondent conclusively pronounced itself on the issue in the First Request for Review. Further, That even if the question of whether or not the 2nd Interested Party had submitted the said requirements was properly before this court, the same would amount to sitting on an appeal of the decision of the Board because a determination of such a question would be on the merits of the application for review before the Respondent, which is not in the realm of judicial review. The Interested Party relied on the case of **Optic Technologies Kenya Ltd -vs- Public Procurement Administrative Review & 2 Others, Nairobi High Court JR Application No 640 of 2017** that a court sitting in judicial review cannot interfere with the merits of the Respondent's decision.

56. Lastly on this issue, the 2nd Interested Party submitted that the Respondent has powers to review decisions made by procuring entities through their evaluation committees, under section 173 of the Act. Further, that under Section 173 (c) of the Act, the Respondent has the discretion to substitute its decision for that of a procuring entity, as held by the Court of Appeal in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others, [2012] eKLR**. Therefore, that the Respondent acted within its scope of powers under the Act.

57. For the avoidance of doubt, the main question that was raised by the 2nd Interested Party in the Third Request for Review, is the legality of the detailed evaluation that was purported to be carried out by the 1st Interested Party, after the Respondent's decision of 22nd January 2018.

58. I will reproduce the Respondent's findings on the said question verbatim for an appreciation of the same, in analyzing the first issue as to any illegality of otherwise in the said decision:

“The question which then arises in this Request for review is whether faced with the two decisions given by Board in Review Applications Number 9 of 2017 and 1 of 2018 which have become final, the Procuring Entity could lawfully constitute a different tender evaluation to carry out a fresh evaluation of the tenders from the start notwithstanding the fact that a tender evaluation committee which had lawfully been constituted had carried out an evaluation of the tender as evidenced by the decision given by the board on 7th December, 2017 in Request for Review Number 99 of 2017.

It is the Board's respectful view the action by the Procuring Entity was wrongful because by 18th October, 2017 the tender evaluation committee constituted to evaluate the tenders in issue had carried out a preliminary, technical and the financial of the tenders and had made a recommendation that the tender in issue be awarded to the applicant at its tender price of 2,998,533.88 Euros (V.A.T) inclusive which was lower than the price quoted by the successful bidder herein namely the sum 3,083,566.00 Euros.

Having completed the evaluation process and made a recommendation of award in 18th October, 2018 in a report signed on 17th October, 2017, the only meaningful interpretation of the Board's decisions given on 7th December, 2017 and 22nd January, 2018 was that the Procuring Entity completed the remaining part of procurement process by issuing a letter of award in favour of the Applicant.

The Board has carefully read the two decisions given in Reviews No. 99 of 2017 and 1 of 2018 and finds that nowhere in the said decision did the Board fault the process of evaluation up to the point of recommendation of award. Nowhere in any of the two decisions did the Board also direct the Procuring Entity to reconstitute the tender evaluation committee a fresh to re-evaluate the tenders which had already been evaluated. The board's decision in application No. 99 of 2018 to the point and specifically stated as follows:-

“For the purposes of an orderly and lawful completion of the procurement process herein, the Procuring Entity is directed to complete the procurement process herein including the making of an award of the tender in question based on the recommendations contained in the tender financial evaluation committee's report which was signed on 17th October, 2017 within a period of seven (7) days from today's date.”

Further to all the above, the effect of the Procuring Entity's action of reconstituting the tender evaluation committee afresh is that there are now two contradictory evaluation reports prepared by the Procuring Entity relating to the same tender. It is however legally untenable to have two evaluation reports relating to the same tender prepared by a Procuring Entity unless the earlier evaluation report is set aside or annulled on the motion of a bidder in a Request for Review or by the court.

If the board were to allow two evaluation reports containing different recommendations of award to be prepared in respect of the same procurement process then such an eventuality would give rise to uncertainty and deprive procurement processes of the integrity envisaged by among other legal instruments by the provisions of Article 227 of the Constitution and Section 3 of the Public Procurement and Asset Disposal Act.”

59. It is evident from the said decision that the decision was being made in light of the previous decisions by the Respondent in the First Request for Review and Second Request for Review. The decision on the First Request for Review dated 7th December 2017 addressed the processes of technical evaluation, the financial evaluation and the initial due diligence carried out on the 2nd Interested Party. Observations were made by the Respondent therein in its decision on the shortcomings of the due diligence that had been carried out, and that it could thus not be a basis for informing a decision on the winning tender, AND the 1st Interested Party was directed by the Respondent to proceed with the procurement process.

60. The Second Request for Review was on the termination of the tender on detection of material governance issues, based on a professional opinion by the 1st Interested Party's General Manager Supply Chain Professional Opinion dated 21st December 2017. It is notable in this respect that there had been an earlier professional opinion dated 7th August 2017 and which was approved by the 1st Interested Party's Managing Director that was the subject of the First Request for Review. The Respondent's decision on the said Request for Review on 22nd January 2018 addressed the legality or otherwise of the professional opinion dated 21st December 2017 .

61. No evidence has been placed before this Court that the said decisions by the Respondent on the First Request for Review and Second Request for Review were overturned on appeal, or quashed by a competent court of law, and the findings therein therefore still stand. Therefore, the Applicant and 1st Interested Party are estopped from challenging the legality of the Respondent's decisions therein, particularly on the technical responsiveness of the 2nd Interested Party's tender, and on the professional opinions carried out by the 1st Interested Party.

62. Section 175 (1) of the Public Procurement and Asset Disposal Act in this regard requires a person aggrieved by a decision made by the Respondent to seek review within fourteen days, failure of which the decision of the Respondent becomes final and binding. There was thus no error committed by the Respondent in its Third Request for Review, when it proceeded to determine the issues before it on the basis that its previous decision were correct, final and binding, in light of the provisions of section 175 of the Public Procurement and Asset Disposal Act.

63. Secondly, I also find that there was no error made by the Respondent in its decision on the Third Request for Review as no evidence or arguments were placed before it of the allegations now being made by the Applicant and Interested Party. A perusal of the arguments made before the Respondent in the Third Request for Review shows that the Applicant, who was the Interested Party therein, argued on the that

they were not precluded from raising the issues relating to the responsiveness of the 2nd Interested Party's tender by the doctrine of *res judicata*, as they had not participated in the previous Request for Reviews.

64. The 1st Interested Party's argument in the Third Request for Review was that it disbanded the initial tender evaluation committee pursuant to section 44 of the Act after it had been impugned by the Respondent, and thereupon constituted a new tender evaluation committee pursuant to the provisions of section 46(4) of the Act.

65. It is thus evident that the issue before the Respondent was the propriety of constituting a new evaluation committee by the 1st Interested Party, and not the need to complete the initial evaluation process and comply with any mandatory requirements as to due diligence and professional opinions under section 83 and 83 of the Act. The new evaluation was also admitted to by the 1st Interested Party in the said proceedings, and in a letter by its Managing Director dated 27th February 2018 (annexed by the 1st Interested Party to its replying affidavit as "Annexure GK9") which reads as follows:

"KPC/PU/028-OT/17 27th February 2018

Managing Director

Transpower Energy Solutions

P.O. Box 50755-00200

NAIROBI

Email:sales@transpowerafrica.com

Dear Sir,

RE: TENDER FOR SUPPLY INSTALLATION AND COMMISSIONING OF MAINLINE METERING SYSTEM

We refer to your tender for the above and to the letters of termination dated 21st December.

The Public Procurement Administrative Review Board's ruling of 22nd January 2018 in the Request for Review Application No. 1 of 2018, M/s Transpower Energy Solutions Limited -vs- Kenya Pipeline Company Limited, declared the termination of the procurement process null and void and set aside the same. Further the Board directed that KPC completes the procurement process.

Detailed evaluation of the tenders has been carried out again and KPC regrets to inform you that your tender was not successful due to lack of following:

The equivalent OIML R-117 Custody Transfer Type approval from the country of origin. Instead test reports from NMI and PTB which are not an equivalent were provided.

The tender was awarded to M/s Krohne Pty Limited at Euros 3,007,056.00 Inclusive of all taxes. Kindly arrange to collect your bid bond from the office of the General Manager-Supply Chain. KPC wishes to thank you for having taken time to participate in this tender.

Yours faithfully,

JOE SANG"

66. The Respondent cannot therefore be faulted for failing to consider the provisions and effect of sections 83 and 83 of the Act, when the said section were not in issue, nor raised before it for determination in the Third Request for Review.

67. In addition, no evidence was provided before this Court of a due diligence carried out by the 1st Interested Party pursuant to section 83 of the Public Procurement Act, and in conformity with the Respondent's decision dated 22nd January 2018 to complete the procurement process. On the contrary the 1st Interested Party admits to carrying out a fresh evaluation, contrary to the orders and directions given by the Respondent to complete the initial procurement process.

68. There is thus demonstrated non-compliance with the directions and orders of the Respondent by the 1st Interested Party, who also breached the provisions of the law in section 175 and 176 of the Act which requires it to obey all orders of the Respondent. This Court cannot sanction such non-compliance by dint of the said sections of the law, and for this reason finds that the Respondent was not in error in safeguarding the rule of law and in the public interest in its decision.

69. I also find no error of interpretation or application of the law by the Respondent, in light of the requirements of section 83 and 84 of the Act, as it is clear from the said section, the stage at which due diligence is to be undertaken in a procurement process and the manner of

doing so. Section 83 provides as follows:

“(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

70. Due diligence is in this regard defined in **Black’s Law Dictionary , Ninth Edition** at page 523 as “the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation” Diligence on the other hand is defined as “the attention and care required from a person in a given situation”.

71. Section 84 of the Act in addition provides as follows:

“(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).”

72. It is evident from the provisions of the two sections that due diligence and provision of a professional opinion are part and parcel of an ongoing evaluation, and one cannot therefore equate a totally new evaluation with the requirements espoused by section 83 and 84 of the Act.

73. In addition, the legal requirement and obligation placed upon the 1st Interested Party in this regard, was in the context of the several orders given by the Respondent in the First and Second Request for Reviews, which were to conclude an ongoing procurement process. There was thus no error made by the Respondent in finding that it had not annulled the previous evaluation processes, and the 1st Interested Party’s new evaluation was illegal, null and void.

74. Lastly, the powers of the Respondent as provided for in section 173 of the Act empower it to direct the 1st Interested Party, which was the procuring entity to either complete the procurement or to substitute the procuring entities decision. Section 173 provides that upon completing a review, the Review Board may do any one or more of the following—

(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.

75. The Court of Appeal in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR** observed as follows with regard to the jurisdiction and powers of the Respondent:

“...The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. It has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. The Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that

its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it."

76. The decisions cited by the Applicant and 1st Interested Party namely Are distinguished on the following grounds, the powers of substitution in the present case were exercised by the Respondent in relation to the decision by the 1st Interested Party's Accounting Officer to conduct a fresh evaluation, in line with the holding in **Republic vs The Public Procurement Administrative Review Board ex parte Kenya Power and Lighting Company (2017) e KLR** that the powers of substitution given to the Respondent are now restricted to decisions made by the Accounting Officer.

77. In addition in the present case the Respondent did make findings on the responsiveness of the 2nd Interested Party's tender in its previous decisions which were not challenged by the Applicant and 1st Interested Party, and cannot therefore be argued to have flouted the mandatory provisions of the law or tender documents in the substitution, which was the case in **Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology [2016] eKLR**, and **Republic vs The Public Procurement Administrative Review Board and 2 Others ex parte Numerical Machining Complex Limited (2016) e KLR**.

78. From the foregoing, the Respondent's decision to substitute the 1st Interested Party's award and award the tender to the 2nd Interested Party was within the law and its mandate as provided for in section 173 of the Public Procurement and Asset Disposal Act. It is thus my finding that the Applicant has not been able to demonstrate any illegality or error of law in the Respondent's decision dated 22nd March 2018.

79. On the second issue as to whether the decision was procedurally unfair, the main argument raised by the Applicant was that by awarding the tender to the 2nd Interested Party when the tender had not been subjected to two critical stages of due diligence and a professional opinion amounted to procedural impropriety. This argument has however been disposed of in the previous findings in this judgment.

80. The Applicant further submitted that the Respondent held that the 1st Interested Party's reconstitution of the tender evaluation committee was meant to tilt the process in favour of a particular bidder. That the Respondent further held that the 1st Interested Party had been given two opportunities to do the right thing but instead, it squandered them through processes which contravened the provisions of the Act and Constitution in order to arrive at a particular result. According to the Applicant, in view of the fact that it was awarded the tender by the 1st Interested Party, which was nullified by the Respondent's in the impugned decision, the Respondents statements implied that the Applicant had entered into an unholy alliance with the 1st Interested Party and/or that it had unduly or inappropriately influenced the 1st Interested Party as to benefit by being awarded the tender, when evidence was tendered to support such a finding, and it was not in issue in the proceedings.

81. Therefore, that any reasonable man looking at the circumstances of this case would conclude that there is a real likelihood that the Respondent was biased and that indeed it was biased against the Applicant and the 1st Interested Party in this matter. Reliance was placed on the case of **Republic v Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & another [2017] eKLR**.

82. The 1st Interested Party's submissions were along the same lines as the Applicant's submissions, namely, that the Respondent failed to take into account that the 2nd Interested Party did not meet the mandatory requirements of the tender, which issue this Court has already addressed. Further, that the Respondent cast aspersions on the Applicant's character as to its conduct during the procurement process without giving it an opportunity to be heard, and it was prudent enough for the Respondent to determine that the 1st Interested Party had not complied with its previous decision.

83. The 2nd Interested Party on its part submitted that from the record and the Respondent's decision, it is clear that that the Applicant and the 1st Interested Party were given the opportunity to be heard. Further, that the Respondent took into consideration all the submissions presented by the parties and rendered its decision, and the mere fact that the application was decided against the Applicant does not make the decision biased. In addition, that the Applicant has not presented any evidence of bias on the part of the Respondent, yet it is trite law that he who alleges must prove.

84. The Respondent in response submitted that its observations were clearly findings that were borne from the history of the proceedings before it and were clearly a factor that any impartial tribunal would reasonably be expected to note in considering the appropriate orders to make. The Respondent cited various judicial authorities on what constitutes bias, including the Court of Appeal decisions in **Standard Chartered Financial Services Ltd & 2 Others vs Manchester Outfitters (Suiting Division) Limited & 2 Others (2016) e KLR** and **Kimani vs Kimani (1995-1998) 1 EA 134**, to submit that any person properly apprised of the facts of the matter would not form an opinion that the Respondent's observations were indicative of bias against the Applicant and 1st Interested Party.

85. On the allegations made of bias, the relevant observations made by the Respondent in this respect were as follows:

"It is also evident from what the Board has set out above that the Procuring Entity's actions to terminate the subject tender at one stage and by later reconstituting the tender evaluation committee afresh were meant to tilt the process in favour of a particular bidder. The Board cannot however accept such kind of attempts aimed at circumventing due process."

86. It is an established principle of natural justice and fairness that a decision maker must not be influenced by partiality or prejudice in

reaching his or her decision. Similarly, a decision maker must not act in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she was biased. The latter type of bias, commonly referred to as apparent bias, what is alleged by the Applicant and 1st Interested Party on the part of the Respondent, arising from the observations it made.

87. The test for apparent bias was stated in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge**, [1995-1998] 1 EA 134 by Lakha, JA as follows: -

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

88. Having considered the nature of the observations made by the Respondent, I find that the same were a conclusion it made that was informed by its previous decisions and the evidence before it, and it thus provided the reasons for the particular findings made therein. In addition, it is my view that a fair minded person, who was informed of the circumstances in which the said observations and conclusion was being made, would find the same a reasonable and justifiable fair comment. This is particularly given the observations made by the Respondent as regards the non-compliance by the 1st Interested Party of the Respondent's previous orders.

89. Lastly on this issue, all parties were allowed to participate in the impugned decision with the Respondent noting at page 6 of its decision that the Applicant therein who is the 2nd Interested Party herein; the Procuring Entity, who is the 1st Interested Party herein, and the Interested Party therein, who is the Applicant herein; were all represented during the hearing and the Respondent set out all the said parties respective submissions which were considered in its findings. I thus find that there was no evidence of procedural impropriety or bias on the part of the Respondent.

90. On the last issue on the relief sought, the Applicant is seeking orders of certiorari and prohibition. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge (supra)** held as follows as regards the nature of the two judicial review orders sought by the Applicant:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

91. This Court has found that the Respondent's decision of 22nd March 2018 was within its powers and mandate, and that the Respondent did not act unfairly. Lastly, the Respondent cannot be prohibited from exercising its statutory powers and duties. The orders of prohibition and certiorari sought by the Applicant do not therefore lie for these reasons.

92. In the premises, I find that the Applicant's Notice of Motion dated 18th April 2017 is not merited, and it accordingly fails. The same is hereby dismissed with costs to the Respondent, 1st Interested Party and 2nd Interested Party.

93. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE