REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 60 OF 2017

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 OF 2015

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REPUBLIC .....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

THE CABINET SECRETARY FOR MINISTRY OF DEFENCE....1ST INTERESTED PARTY

SAMEER AFRICA LIMITED.....2ND INTERESTED PARTY

JUDGMENT

1. The exparte applicant **HAJI MOTORS LIMIITED** by its application dated 22nd February, 2017 seeks from this court the following orders:

a. An order of certiorari removing to this Honorable Court for the purposes of being quashed the decision of the Public Procurement Administrative Review Board (Review Board) made on the 1st February 2017 in Application No. 8 of 2016.

b. An order of prohibition restraining the respondent from interfering with a procurement process that has not been placed before it for review; such interference being either issuing directives on how the procurement process should be conducted and issuing warning and/or threat that such process thwarted/overturned once brought before it for review in other way.

c. The costs of the application to be provided for.

2. The notice of motion is predicated on the grounds on the face of the motion, the statutory statement and two verifying affidavits sworn by MARK OKUMU, FINDESIO MBIUKI and GEOFFREY MUSYOKA.

3. The exparte applicant's case is that sometime in 2015 the Government of Kenya through the Ministry of Defence advertised a tender for supply of tyres, tubes and lubes to be used by the military. The Ex-Parte Applicants participated in the tender and fortunately were awarded the same. In November 2015, the Ex-Parte Applicants were notified of the tender award and after fourteen (14) days had passed they were called upon to sign contracts with the Ministry of Defence. The 14 days period was allowed so as to give any aggrieved persons time to lodge a review request against the tender process. However, no one lodged such review request hence the contracts were signed.

4. The contracts were to start running immediately for a period of twelve (12) months and the Ex-Parte Applicants went straight into the business of supplying the goods contracted for. They mobilized resources by mostly taking credit facilities, whereby they entered into collateral agreements with third parties as well as with their respective suppliers. They started supplying the goods.

5. It is alleged that Four (4) months later in February, 2016 the Ex-Parte Applicants were shocked when one day they learnt that their contracts had been declared invalid and stopped. That the applicants later learnt that a request for review had been filed before the Respondent by the 2nd Interested Party and that even though the applicants were not represented because they were not notified of the proceedings, the Respondent had gone ahead to cancel the contracts after annulling the tender awards and directed the Ministry of Defence to advertise the tender afresh.

6. It is further alleged that before this happened, sometime in early December 2015, immediately after the Ex-Parte Applicants had signed contracts with the Ministry of Defence, the 2nd Interested Party had sent its representatives to persuade the Ex-Parte Applicants to source the contract goods from the 2nd Interested Party because the latter had stocked very many of those goods in its stores.

7. It is claimed that it was the 2nd Interested Party that had been supplying the Ministry with those tyres, tubes and lubes for many years before and as such they had stocked enough of them in the belief and anticipation that they would automatically win subsequent tenders. However, due to their alleged difficult terms of business such as extremely high prices and demand for payment upfront, the Ex-Parte Applicants could not agree to that proposal.

8. Besides, that the Ex-Parte Applicants had already initiated arrangements with suppliers abroad. The applicants claim that upon the Ex-Parte Applicants declining the 2nd Interested Party's offer, the latter threatened to do everything possible to scuttle the tender awards and secure it for itself instead. It is claimed that the 2nd Interested Party had participated in the tender process but was disqualified because it failed to submit a Certificate of Tax Compliance.

9. On learning about the Respondent's aforesaid (initial) decision, the Ex-Parte Applicants invoked the court process to challenge it in Judicial Review Application No. 133 of 2016, wherein the court was also shocked that such a process that blatantly violated the rules of natural justice could be used to terminate the Ex-Parte Applicant's contracts. That the court quashed the Respondent's decision and ordered it to conduct a fresh hearing in which the Ex-Parte Applicants were given the chance to participate.

10. It is alleged that when the Ex-Parte Applicants filed their Application in court to challenge the Respondent's decision, they had sought an Order staying the decision of the Respondent pending the hearing and determination of that Application, and that the court granted the Order of Stay. Accordingly, the Ex-Parte Applicants went on with the performance of their contracts and supplied the goods that they had been contracted for, which were items needed by the Ministry for use by the military in their day-to-day operations.

11. However, it is alleged that by the time the court was giving its judgment in November, 2016, the contracts entered between the Ex-Parte Applicant and the Ministry of Defence had already been concluded because the parties had completed performing their obligations and the contracts were expiring. The applicant avers that even though the process had taken another turn and had become overtaken, the Ex-Parte Applicants participated and presented their submissions.

12. That on 1st February, 2017 the Respondent delivered a fresh decision on the Review Application No. 08 of 2016, in which it annulled the tender No. MOD/423(01103)2015-2016 and declared null and void all actions taken thereunder and ordered re-advertisement of that tender within 14 days of the decision. Further, that the Respondent issued directives requiring the Ministry of Defence to re-start any ongoing tender process for this year of 2017, failure to which the Respondent will thwart/overturn the process when brought before it for review.

13. The applicant therefore asserts that the Respondent acted in excess of its jurisdiction, unprocedurally and irrationally when it purported to interpret this Court's decision of Stay such as to annul its true implication and assign it a new meaning that would be consistent with the Respondent's own decision.

14. That when the Ex-Parte Applicants went to court to challenge the earlier decision of the Respondent which had annulled their contracts, they sought a Stay Order which was granted, hence, performance of the contracts went on.

15. Unfortunately the proceedings before the High Court took close to a year to conclude, by which time the contracts had been performed to conclusion and were expiring. This notwithstanding, the Order of Stay was effectual and an attempt by the Respondent to assign it a new meaning so as to find the Ex-Parte Applicants culpable is arbitrary, irrational and ultra vires.

16. The applicants further aver that the Respondent acted arbitrarily and irrationally when it pronounced the contracts signed between the Ex-Parte Applicants and the Ministry as null and void on account of the Ministry's obligation to send award notices to tender participants. That signing of contracts under Section 68 of the Public Procurement and Disposal Act, 2005 is a matter of fact, and the Act acknowledges that once contracts have been entered legal obligations arise as between parties.

17. It was averred that particularly in this case, once the contracts were signed the Ex-Parte Applicants assumed their obligations thereunder and began mobilizing the goods whereby they entered into several collateral agreements with suppliers and financiers and that by the time the Request for Review was lodged in February, 2016 the Ex-Parte Applicants had already secured their orders from their suppliers and were delivering to the Ministry.

18. It was therefore allege that it was outright arbitrary and irrational for the Respondent to invalidate those contracts and punish the Ex-Parte Applicants on the basis that a notice of award was not served by the Ministry upon an unsuccessful tenderer, especially when that unsuccessful tenderer was disqualified from the process at the preliminary stage for failure to furnish the Ministry with a Tax Compliance Certificate and a Form CR12.

19. The Respondent is also said to have acted unprocedurally and considered extraneous matters when it divulged into the processes of notification of an award by a procuring entity under Section 67 of the Public Procurement and Disposal Act, 2005, whereas what was before it for determination was simply a question of whether or not contracts had been signed between the parties as a matter of fact under Section 68 of the said Act.

20. The Respondent is also accused of acting irrationally when it directed the Ministry of Defence to re-advertise the tender in question afresh, knowing very well that those goods needed by the Ministry in that year had already been supplied, the budgetary allocations for those goods had already been expended and that financial year had already lapsed, and that it was impossible for the Ministry to do such thing, as the Ministry no longer needed those goods for that year as they were already supplied and paid for, and that year had already passed.

21. Further to the above, the applicants claimed that the Respondent acted irrationally and in violation of the law of procurement when it ordered the Ministry of Defence to re-advertise the tender in question afresh in the year 2017, knowing very well that the law requires that before any tender is advertised by a public entity, budgetary allocations for that tender must have been made, in which case there is no budgetary allocation for those goods in the year 2017, which goods had been provided for in the year 2016 and were actually supplied and paid for and that in any case the Ministry had no means of financing those goods anymore.

22. The applicant also claims that the Respondent acted irrationally when it directed that the tender in question, being for year 2015-2016, should be re-advertised afresh and be conducted before the Ministry of Defence can undertake any other procurement process for goods of similar nature, yet the procuring entity had already commenced a procurement process for the year 2017 and needed to conclude it so as to obtain goods that were urgently needed for use in the day-to-day operations of the military. Further, that the Respondent had already indicated that it would not hesitate to overturn any subsequent tender processes of the Ministry if such is conducted before its order concerning the tender of 2015-2016 is complied with, accordingly the Ministry was unable to move.

23. The exparte applicants further claimed that the Respondent exceeded its jurisdiction, acted irrationally and in consideration of extraneous matters when it considered and made a determination on a prospective tender process that had not been placed before it for review by any party to the proceedings, and using such considerations on the extraneous matter to make a determination on the matters properly before it. That during the hearing, the Respondent called for documents and required the parties to make submissions on a prospective tender process being conducted by the Ministry of Defence and thereafter used its considerations thereon to inform its decision.

24. The applicant further alleged that the Respondent exceeded its jurisdiction and acted in utter disregard of the rules of procedure under Sections 93 and 98 of the Public Procurement and Disposal Act, 2005 (repealed), when during delivery of its decision it issued directives on how a prospective tender process that had not been brought before it for review by any person and which was not subject of the request for review, should be conducted and issued threats to the effect that if its directives were not followed with respect to that tender process then once placed before it for review the Respondent will automatically overturn such tender process.

25. Further to the above, it was alleged that by doing this the Respondent is abusing and misusing its authority to intimidate the 1st Interested Party and thereby prejudicing the rights and interests of the Ex-Parte Applicants and in deed any person who may wish to participate in tenders of the 1st Interested Party, so as to secure the ambitious interests of the 2nd Interested Party.

26. The exparte applicants also allege that the Respondent acted ultra vires, unprocedurally and irrationally when it disregarded the Order of the High Court issued in Judicial Review Misc. Application No. 133 of 2016 staying the decision of the Respondent that it had issued in previous proceedings on the same subject matter (which was quashed by the High Court) and instead went ahead to condemn the Ex-Parte Applicants and the 1st Interested Party for not complying with the stayed decision, thereby declaring that the Ex-Parte Applicants acted illegally and punishing them with orders of costs in favour of the 2nd Interested Party.

27. The exparte applicants further claimed that the Respondent acted irrationally and unfairly when it condemned the Ex-Parte Applicants for supplying goods that it had a contractual obligation to deliver to the 1st Interested Party, the Ex-Parte Applicants having signed contracts with the 1st Interested Party and having no knowledge of whatever had transpired between the 1st Interested Party and other participants in the tender process or whatever had transpired during the previous proceedings before the Respondent (that were quashed), and thereby declaring that the Ex-Parte Applicants acted illegally and requiring them to pay costs to the 2nd Interested Party.

28. That the Respondent acted irrationally, unreasonably and unfairly when it failed to consider the realities of the tender in question before it; that the goods required to be supplied were military tyres, tubes, lubes and related accessories that were necessary for the country's military operations in the war against Al Shabaab in Somalia, and which the 1st Interested Party could not under any practical circumstances do without, and which the Ex-Parte Applicants had to supply immediately they were demanded by the 1st Interested Party pursuant to the contracts.

29. It was averred that instead, the Respondent condemned the Ex-Parte Applicants for supplying the goods thereby declaring that they acted illegally and slapped them with costs in favour of the 2nd Interested Party.

30. It was therefore averred that it is in the interest of justice and fairness that this honourable court allows the Ex-Parte Applicants the orders of Certiorari and Prohibition sought herein.

The Respondent's Case

31. The Respondent Review Board filed replying affidavit sworn by **Henock Kirungu** on 24th March 2017 contending, among others that upon receiving the request for review application from 12th February 2017 in respect of the subject tender, the Board heard all the [parties involved and delivered its decision on1st February 2017 allowing the request for review by the applicant herein. And that the decision thereof was rendered in accordance with the provisions of section 173 of the PPADA which allows the Review Board to annul the tender.

That the Review Board also ordered the Procuring Entity to re advertise afresh the tender for the supply and delivery of tyres and tubes of various sizes within 14 days from the date of the said ruling. Further, that in arriving at the above decision, the Review Board was alive to all the facts raised by the parties to the Request for Review.

32. According to the Review Board, the decision rendered was reasonable, rational and lawful hence the judicial review proceedings hereof are made in bad faith, have no merit and are only intended to calculate to harass the credibility of the Respondent's mandate and functions, while ultimately eroding the public confidence in procurement procedures and processes regulated by the Authority in Kenya.

33. The Review Board maintained that it has continued to uphold procurement procedures as required by law and that it has promoted the integrity of these procedures and processes and has not flouted any law nor acted in excess of its powers.

34. The 1st Interested Party Procuring Entity did not file any response to the application for judicial review.

The 2nd Interested Party's case

35. The 2nd interested party SAMEER AFRICA filed a replying affidavit sworn by Edgar Imbamba its Company Secretary contending that the decision of 1ST February 2017 by the Review Board was consistent with the High Court directions directing the respondent to rehear the parties denovo and that the decision was therefore fair, reasonable, rational, *intra vires* the jurisdiction donated by the Act and the Rules and that the said jurisdiction was exercised regularly and rationally in the circumstances for reasons that:

a. At page 10 of its 2nd decision, the Review Board recognized that the High Court had faulted its decision on two grounds viz;

i. That the Review Board had not accorded the interested parties a Hearing; ii. That it had failed to consider whether at the time of the Request for Review the parties had entered into a valid contract thereby depriving the Board of the jurisdiction to hear and determine the Applicants Review. iii. The Review Board was therefore fully conscious why the High Court remitted the matter back to it and it proceeded on that understanding and that prior to delivering its 2nd decision, the Review Board heard all the parties represented including the interested parties as ordered by the High Court. (iv) at pages 18, 19,20,21,22 and 23 of its 2nd decision the Review Board critically analyzed the facts and the law on the issue whether parties had entered into valid contracts thereby depriving it jurisdiction to hear the Review Application. At page 23 the Review Board found and held that the procuring entity had breached Section 67 & 68 of the Act and therefore the contracts signed were null and void and they could not therefore deprive the Review Board jurisdiction to hear the Request for Review; (v) On the evidence before it, the Review Board was satisfied that the Procuring Entity was in breach of Sections 69 and 67 and Regulation 66 by failing to notify Sameer Africa of the outcome of its bid. It was therefore right in declaring that the contracts were signed against the law and were therefore null and void; (vi) Time within which an unsuccessful bidder should file a Review Application starts to run upon formal notification of the outcome of the tender. In this case, therefore, time begun to run on 9th February, 2016 when Sameer Africa received the notification. The allegation therefore, that the Review Board entertained the Review application three (3) months after notification is factually incorrect and therefore legally untenable(vii)The Review Board having found as facts that the Procuring Entity failed to formally notify Sameer Africa of the outcome of its bid and further that the Procuring Entity breached terms of the tender documents and the Act and Regulations by splitting and awarding the tender to three bidders (the present Applicants), the Review Board was entitled to issue the orders it issued.(viii) The Statutory powers donated to the Review Board under Section 173 of the Act are wide and includes the orders of annulment of the awards, cancellation of illegal contracts and ordering retender and the said powers were properly exercised in the circumstances of this case.

10. That the execution of a contract, of itself, does not take away the Review Board's statutory powers to entertain and determined a review application where the Review Board finds merit in it since the Review Board has statutory powers to annul and cancel a contract that is signed pursuant to a tender process that the Review Board finds flawed.

11. That the mere signing of contracts and/or their performance, partially or fully cannot in itself be a ground for sanitizing a tender process which the Review Board has rightly found and held to be irregular, illegal, null and void.

12. That the allegation that the Review Board acted beyond its jurisdiction, unprocedually and irrationally by interpreting the High Court's stay orders to give it a new meaning is false unsubstantiated and factually incorrect. There is nowhere in the body of its decision or otherwise where the Review Board did or attempted to assign a new and different meaning to the High Court

13. That the judicial review remedy of certiorari sought by the applicants is not available to them and that the applicants have miserably failed to meet the threshold for the grant of such orders in that:

a. For the order of certiorari, it has not been shown that the Review Board acted in excess jurisdiction, that there is an error on the face of the record, or that there was breach of natural justice or that the Review Board failed to take into account relevant factors but took into account irrelevant factors. No specific and identified instances have been demonstrated by the applicant.

b. To the extent that the Act and Regulations specifies the manner and mode in which the Review Board discharges its statutory duties and with the Review Board having discharged such duties in the manner and mode prescribed, no order of certiorari can issue against it.

c. In the entire motion and supporting affidavits, the applicants have premised their cases on irrelevant material facts that do not bear on the special jurisdiction of a judicial review court which amounts to challenging the merits of the Review Board's decision. Judicial review is concerned not with the merits of a decision but the decision making process.

d. The applicants' application is an appeal disguised as a judicial review process and it ought and should fail with costs.

14. That to the extent that the Applicants are calling upon this court to adjudicate on the same and/or similar issues that they had raised in the earlier judicial review proceedings which this court fully and finally determined in its judgment delivered on 6th October 2016, the present application offends the principles of *Res judicata and overriding objective* of civil litigation and should be dismissed.

15. That noting that the Applicants have admitted that they have been servicing the illegal contracts arising out of this tender process despite the stay order issued by the Review Board, these proceedings, just like the earlier judicial review proceedings are filed purely to ensure that they continue to perform the illegal contracts and scuttle the entire tender process to the great prejudice of Sameer Africa. The 2nd interested party urged this court to dismiss the application for judicial review with costs.

Submissions

35. Parties advocates filed written submissions which they adopted for the court's consideration.

Exparte applicant's submissions

36. The exparte applicant set out the history of the matter and submitted, relying on the case of **Isaac Gathungu Wanjohi & another v Director of City Planning, City Council of Nairobi & another [2014] eKLR**, which sets out instances when an application for judicial review would succeed, as was stated in the case of **Pastoli vs. Kabale District Local Government Council and Others [2008]2 EA 300).**

37. On the assertion that the Respondent acted ultra vires, arbitrarily, irrationally, in consideration of extraneous matters and in abuse of authority as illustrated below, it was submitted that: the respondent in this case purported to assign the decision of this honourable Court a different meaning, by interpreting the court's decision of Stay such as to annul its true implication and assign it a new meaning that would serve the former's purpose.

38. It was submitted that when the Ex-Parte Applicants went to court to challenge the earlier decision of the Respondent which had annulled their contracts, they sought an order of stay of the decision of the Respondent, which order was granted in JR Misc. Application No. 133 of 2016, which stay according to the exparte applicant, effectively allowed performance of the contracts to go on. However, that as the proceedings before the High Court took close to a year to conclude, by which time the contracts had been performed to conclusion and were expiring.

39. It was therefore submitted that the Respondent's holding that the stay order did not have the effect 'of staying' and that the Ex-parte Applicants were bound by the impugned decision and process of the Respondent, was in total disregard of the Court order staying the impugned decision of the Respondent.

40. Further, that the order of the Respondent condemning the Ex-Parte Applicants and the 1st Interested Party for not complying with the stayed decision and punishing them with an order of costs in favour of the 2nd Interested Party, was arbitrary, irrational and ultra vires.

41. It was further submitted that the Respondent acted arbitrarily and irrationally when it pronounced the fulfilment of the Ex-Parte Applicants' obligations under the contract as null and void, based on the Ministry's obligation to send award notices to tender participants. In the view of the exparte applicants, signing of contracts under Section 68 of the Public Procurement and Disposal Act, 2005 is a matter of fact, and that the Act acknowledges that once contracts have been entered into, legal obligations arise as between parties which was never the case here.

42. It was further submitted on behalf of the exparte applicant that once the contracts were signed, the Ex-Parte Applicants assumed their obligations therein and began mobilizing the goods, whereby they entered into several collateral agreements with suppliers from abroad and financiers. That by the time the Request for Review was lodged in February, 2016 the Ex-Parte Applicants had already secured their orders from their suppliers abroad and were delivering the goods to the Ministry of Defence.

43. It was therefore submitted that it was arbitrary and irrational for the Respondent to invalidate those contracts and punish the Ex-Parte Applicants on the basis that a notice of award was not served by the Ministry of Defence upon an unsuccessful tenderer, when the Ex-pate Applicants were not responsible for such process, especially in a situation where the unsuccessful tenderer in question was disqualified from the procurement process at the preliminary stage for failure to furnish the Ministry with a Tax Compliance Certificate and a Form CR12.

44. The exparte applicant's counsel further submitted that the Respondent acted irrationally and unfairly when it condemned the Ex-Parte Applicants for supplying goods that it had a contractual obligation to deliver to the 1st Interested Party, the Ex-Parte Applicants having signed contracts with the 1st Interested Party and having no knowledge of whatever had transpired between the 1st Interested Party and other participants in the tender process or whatever had transpired during the previous proceedings before the Respondent.

45. Consequently, it was submitted that the Respondent's declaration that the Ex-Parte Applicants acted illegally and requiring them to pay costs to the 2nd Interested Party was irrational and arbitrary.

46. It was further submitted that the Respondent acted irrationally, unreasonably and unfairly when it failed to consider the realities of the tender in question before it, namely: that the goods required to be supplied were military tyres, tubes, lubes and related accessories, which were necessary for the country's military operations in the war against Al Shabaab in Somalia; and which the 1st Interested Party could not under any practical circumstances do without, and which the Ex-Parte Applicants had to supply immediately they were demanded by the 1st Interested Party pursuant to the contracts.

47. It was also submitted that the Respondent acted unprocedurally and considered extraneous matters when it divulged into the processes of notification of an award by a procuring entity under Section 67 of the Public Procurement and Disposal Act, 2005, whereas what was before it for determination was simply a question of whether or not contracts had been signed between the parties as a matter of fact under Section 68 of the said Act.

48. The exparte applicants further submitted that the Respondent exceeded its jurisdiction, acted irrationally and in consideration of extraneous matters when it considered and made a determination on a prospective tender process that had not been placed before it for review by any party to the proceedings, and using such considerations on the extraneous matter to make a determination on the matters properly before it. That the act of the Respondent calling for documents and requiring the parties to make submissions on a prospective tender process being conducted by the Ministry of Defence in the year 2017, and thereafter using its considerations thereon to inform its decision was improper.

49. Further, that the Respondent acted in excess of its jurisdiction and acted in utter disregard of the rules of procedure under Sections 93 and 98 of the Public Procurement and Disposal Act, 2005 (repealed), when, during delivery of its decision it issued directives on how a prospective tender process that had not been brought before it for review by any person and which was not subject of the request for review, should be conducted and that by issuing threats to the effect that if its directives were not followed with respect to that tender process then once placed before it for review the Respondent will automatically overturn such tender process, was ultravires.

50. Further, that by doing so, the Respondent is abusing and misusing its authority to intimidate the 1st Interested Party and thereby prejudicing the rights and interests of the Ex-Parte Applicants and of any person who may wish to participate in tenders of the 1st Interested Party, just so as to secure the ambitious interests of the 2nd Interested Party.

51. The exparte applicant maintained that the Respondent acted irrationally when it directed the Ministry of Defence to re-advertise the tender in question afresh, knowing very well that those goods needed by the Ministry in that year had already been supplied; the budgetary allocations for those goods had already been expended and that financial year had already lapsed, and that it is impossible for the Ministry to do such thing since it no longer needs those goods for that year as they were already supplied and paid for, for the year that had already passed.

52. Further, that the Respondent acted irrationally and in violation of the law of procurement when it ordered the Ministry of Defence to re-advertise the tender in question afresh in the year 2017, knowing very well that the law requires that before any tender is advertised by a public entity, budgetary allocations for that tender must have been made, in which case there is no budgetary allocation for those goods in the year 2017;as the subject goods had been provided for in the year 2016 and were actually supplied and paid for.

53. That the Respondent acted irrationally when it directed that the tender in question, being for year 2015-2016, should be re-advertised afresh and be conducted before the Ministry of Defence can undertake any other procurement process for goods of similar nature, yet the Respondent has already commenced a procurement process for the year 2017 and needed to conclude it so as to obtain goods that were urgently needed for use in the day-to-day operations of the military.

54. That the Respondent's threat that it will not hesitate to overturn any subsequent tender process of the Ministry if such is conducted before its order concerning the tender of 2015-2016 is complied with, was an irrational decision.

55. That the Respondent's decision of 1st February, 2017 is marred with illegality, unreasonableness and procedural impropriety, and as such it deserves to be quashed.

56. Further, that it is in the interest of justice that the Respondent is prohibited from continuing the unlawful interference with the 1st Interested Party's procurement processes.

57. The exparte applicant relied on the case of **Isaac Gathugu Wanjohi and another vs Director of City Planning City Council of Nairobi and another [2014]eKLR** to support its case.

The Respondent's submissions

58. According to the Respondent, Review Board, it made its decision on the 1st February 2017 in Application No.8 of 2016 in line with the provisions of section 98 of the Public Procurement and Disposal Act 2005 and that in doing so it did not in any way act contrary to its envisaged mandate which grants the Board wide powers to review and examine whether the procuring entity complied with the laid down procedures, laws and rules in the procurement process.

59. The Respondent relied on section 98 of the Public Procurement and Disposal Act 2005 provides that Upon completing a review the Review Board may do any one or more of the following—

> (a) Annual anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;

(b) Give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;

(c) Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

d) Order the payment of costs as between parties to the review.

60. It was submitted that judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. That it is a challenge on administrative actions or decisions. It invokes the supervisory jurisdiction of the High Court donated by Sections 8 and 9 of the Law Reform Act and Article 165 (6) of the Constitution which makes it clear that the said jurisdiction is to be exercised over decisions of subordinate courts, any person, body or authority which exercises a Judicial or quasi –judicial function but not over a superior court.

61. Reliance was placed on **Halsbury's laws of England 4th Edition at page 91** where the learned author opines that *"Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons, who carry out quasi-judicial functions or who are charged with the performance of public acts and duties."*

62. According to respondent, it is trite law that judicial review is only concerned with the legality of the decision making process and not the merits of the decision itself as was held in **Commissioner Of Lands v Kunste Hotel Limited [1997]eKLR**. That the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large thus ensuring continued accountability by the public body in question. **In Republic v Chesang (Ms) Resident Magistrate & 2 others Ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others [2017] eKLR** it was stated that;

> It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualized discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities.

63. It was the respondent's submission that the Review Board acted within its powers and followed the right procedure in making its decision, and that the application herein therefore seeks to answer the question of whether the actual decision made was fair or not, a principle which cannot afford to be canvassed by way of a judicial review application.

64. It was contended that the applicant's application is an appeal disguised as a Judicial Review Application and should therefore not be entertained since there is a clear distinction between an appeal and judicial review proceedings. that in Judicial review, the court is only concerned with the fairness of the process under which the impugned decision or action was reached. That Judicial review does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case as is the case in appeals. Reliance was placed on **Sir Dinshaw Fardunji Mulla in his book The Code of Civil Procedure, Volume III Pages 3652-3653** where it is stated:

> "The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure ……The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

65. It was submitted that the High Court's jurisdiction in judicial review, is circumscribed by the provisions of the Law Reform Act (Cap. 26) which also incorporates the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom on power of the High Court in England to make an order of Mandamus, Prohibition or Certiorari.

66. That since the High Court of Kenya has similar powers in judicial review, this has led to the development of fairly well settled criteria for issuance of the orders which include illegality, impropriety of procedure and irrationality as was set out by Korir J in **Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR.**

67. It was further submitted that seeking a judicial review of a decision of a tribunal must satisfy the above criteria in order to succeed. That owing to the fact that the Public Procurement Administrative Review Board in making the impugned decision was acting within its purview of review under section 173 of the Public Procurement and Disposal Act No. 33 of 2015, renders the application before this court as having failed to sufficiently disclose or detail any illegality, impropriety of procedure and irrationality.

68. Respondent restated the grounds upon which the courts grant judicial review set out in the case of **Pastoli vs Kabale District Local Government Council and Others [supra].**

69. Further reliance was placed on **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another [2014] eKLR,** where Justice G. V. Odunga stated:

> "the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree

so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century."

70. Further, it was submitted that the granting of judicial review is deemed to be necessary where there is an apparent error or omission that is self-evident and thus not premised on an elaborate argument for its establishment. Reliance was placed on the case of **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)** where the Court held:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review."

"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

71. The respondent further submitted that the applicant has not demonstrated any breaches of the law or procedure which would entitle this court to intervene in this matter and grant the orders sought. That it has not been sufficiently demonstrated that the Respondent is in breach of any statutory provision or that they acted in excess or without jurisdiction or breached rules of natural justice envisaged in the Public Procurement and Disposal Act No. 33 of 2015. Further, that the application does not meet the basic tenets of judicial review application and should be dismissed with costs.

2nd interested party's written submissions

72. The 2nd interested party filed submissions restating its replying affidavit contending that on the evidence before it, the Review Board was satisfied that the Procuring Entity was in breach of Sections 69 and 67 and Regulation 66 by failing to notify Sameer Africa of the outcome of its bid. It was therefore right in declaring that the contracts were signed against the law and were therefore null and void.

73. That time within which an unsuccessful bidder should file a Review Application starts to run upon formal notification of the outcome of the tender. In this case, therefore, time begun to run on 9th February, 2016 when Sameer Africa received the notification. The allegation therefore, that the Review Board entertained the Review application three (3) months after notification is factually incorrect and therefore legally untenable.

74. It was submitted that the Review Board having found as facts that the Procuring Entity failed to formally notify Sameer Africa of the outcome of its bid and further that the Procuring Entity breached terms of the tender documents and the Act and Regulations by splitting and awarding the tender to three bidders (the present Applicants), the Review Board was entitled to issue the orders it issued.

75. On facts and the law, it was submitted on behalf of the 2nd interested party that while remitting the matter back to the Review Board, the High Court directed that all parties affected by the proceedings be heard. And that the parties in question were all heard hence the rules of natural justice were adhered to by the Review Board in compliance with the High Court decision.

76. On validity of contracts, it was submitted that the High Court directed the Review Board to investigate whether contracts had been signed prior to the hearing of the earlier Review Application and whether such contracts took away the Review Board's right to hear and determine the Review Application.

77. That the Review Board investigated the above issue and made a finding that the Procuring Entity had breached the law and that therefore, any subsequent contracts were null and void.

78. On the allegation by the Applicants that the Review Board's decision was null and void because contracts had been signed, it was submitted in contention that this argument was untenable and lacks legal basis because the execution of a contract does not in itself take away the Review Board's Statutory Powers to entertain and determine a review application where the Review Board finds merit in it, as the Review Board has statutory powers to annul and cancel a contract that is signed pursuant to tender process that the Review Board finds flawed.

79. Reliance was placed on Section 173 of the Act which stipulates:

"Upon completing a review, the Review Board may do any one or more of the following:-

a. Annul anything the procuring entity has done in the procurement proceedings, <u>including annulling the procurement proceedings in their entirety"</u> -------(emphasis added)

17. Further reliance was placed on **HC Misc. Application No. 267 of 2014, Republic vs. Public Procurement Administrative Review Board & 3 others,** where Odunga J. held as follows on the issue of formal notification of the outcome of a tender process;

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

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

80. On the issue of whether the Review Board had jurisdiction to entertain the Review Application after a contract had been signed, further reliance was placed on the decision by **Odunga, J in HCCC Misc No 267 of 2014** (Supra) where he held as follows;

"The decision of the Respondent not to entertain the request for review seems to have been based on Section 93 (2) (c) of the Act. As rightly submitted by the applicant, for the Respondent to be said to have been deprived of jurisdiction, the contract must have been signed in accordance with Section 68 of the Act; It is therefore important to determine whether the contract in question was signed in accordance with Section 68 as the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Respondents makes a determination that it has no jurisdiction to entertain the request by virtue of Section 93 (2) (c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 68 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction. To this extent I agree with the decision in Anisminic Limited vs. Foreign Compensation Commission and Another Case (Supra) to the effect that:

"It is well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court"

81. The 2nd interested party further relied on the decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 {2008} KLR 728,** to the effect that ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the rest of reasonableness and proportionality. In the said case the learned Judge recognized that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. Where therefore an ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable."

82. On allegations that the Review Board's Decision was ultravires the Jurisdiction, it was submitted that contrary to the position advanced by the applicants, Review Board's decision was within the jurisdiction donated by the Act and the Regulations thereunder and that that jurisdiction was regularly and properly exercised. Reliance was placed on section 2 of the Act of the purpose of the Act, and powers of the Review Board as stipulated in section 173 of the Act.

83. It was submitted that all the issues that the Review Board dealt with were issues that had been referred to it by the High Court and/or raised by the parties and the Review Board hence under Section 173 of the Act, the review Board had the jurisdiction to hear and determine the said issues in the manner and make the decision that it reached.

84. On the exparte applicant's stance that the Review Board lacked jurisdiction to hear and determine the Review application for two reasons; namely that the Review Application was filed out of time and was therefore incompetent; and that by the time the Review Application was filed contracts had already been signed between the Applicants and the Procuring Entity and partly performed, it was submitted that in **High Court Misc. Application No. 267 of 2014 (Supra**) Odunga J made two fundamental findings:

(i) The burden to prove formal notification lies with the procuring entity where the receipt of the formal notification is challenge and where it fails to do so, the bidders evidence as to the date of receipt of notification will hold. On the evidence before the Review Board, the Review Application was filed within time and was therefore competent.

(ii) A contract that is not signed in accordance with Section 68 of the Act does not take away the Review Board's mandate to entertain a Review Application.

85. Reliance was placed on **Civil Appeal No. 145 of 2011 Kenya Pipeline Company Ltd vs. Hyosung Ebara & Co. Limited and Others {2012} e KLR,** where the Court of Appeal held as follows on the power of Review Board;

> "The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers of 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. Form its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. (emphasis added). 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. (Emphasis added.) In conclusion …the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly"

86. Reliance was placed on **JR Misc Application No. 92 of 911 Republic vs. The Public Procurement Administrative Board & Another**, where the court held:

> "From the foregoing it is clear that the 1st Respondent considered all the issues raised by the applicants before proceeding to dismiss their request for review. In my view the applicants are asking me to look at the 1st Respondents said decision and reach a conclusion that the 1st Respondent erred both in fact and in law when it reached that decision. The question would then be whether this court acting as a judicial review court has powers to interfere with the decision.

> "This court is being asked to determine whether the 1st respondent misapprehended the law as relates to the technical evaluation and award of scores thereunder. In my view, such an enquiry would amount to sitting on appeal over the decision of the 1st respondent. Indeed Parliament was alive to the distinction between judicial review and appeal in procurement proceedings when it provided in Section 100 of the Act that:-

> 100. (1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.

(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.

(3)……

> In AMIRJI SINGH v THE BOARD OF POST GRADUATE STUDIES KENYATTA UNIVERISTY CIVIL APPLICATION NUMBER 1400 OF 1995 , Justice Aganyanya (as he was then was) clearly explained that a judicial review application cannot be turned into an appeal. He stated that:-

> "But an application by way of judicial review before the High Court is not intended to {turn} it (this Court) into an appellate one to deal with the merits of the issue before the inferior tribunal."

87. On whether the Applicants passed the threshold for granting the Judicial Review Orders Sought, it was submitted that the applicants had miserably failed to demonstrate that the Review Board acted without jurisdiction or in excess of jurisdiction hence they are not deserving of the judicial review orders sought. Reliance was placed on **JR Misc Application No. 87 of 2014, Republic vs. Central Bank of Kenya & Another Exparte Horsebridge Networks Systems {E.A}** Ltd where Justice Korir set out the threshold for grant of judicial review order.

88. In this case, it was submitted that in their application, the supporting affidavits and the statements of facts filed, the applicants have concentrated on challenging or attacking the fairness and illegality of the Board's decision as opposed to challenging the decision making process which is the real purpose of judicial review proceedings, thereby making this court decide on the merits of the decision of the Review Board as if these are appeal proceedings contrary to established law. Reliance was placed on this court's decision in **Judicial Review No. 134 of 2011 citing with approval Halsbury's Law of England 4th Edition Volume 1 at page 92 which** states :

> "Judicial review is concerned with reviewing the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is thus different from an ordinary appeal. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected; t is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that authority constituted by law to decide the matters in question."

89. Similar holding was reached in Civil Appeal No. 185 of 2001 {2002} e KLR where the Court of Appeal held:

"That is the effect of this court's decision in the Kenya National Examination Council case and as the court repeatedly said, judicial review is concerned with the decision making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making 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"

90. Further reliance was placed on the **Kenya Pipeline case (Supra)** where the Court of Appeal further clarified the position as follows:

"Moreover, where proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is to say it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong on matters of fact or that it misdirects itself in some matter" Court in exercising its judicial review jurisdiction would therefore not issue orders merely on the fact that a tribunal has reached an incorrect decision."

91. Further reliance was placed in J**R. Misc. Application No. 477 of 2014 Republic vs. Public Procurement Administrative Review Board & 2 Others** where Odunga J emphasized the purpose of judicial review as follows:

"In other words the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substitute their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question. See Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd. (supra).

In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interest party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather that the process."

92. Finally, it was submitted that the specific orders of certiorari are not available to the Applicants for reasons that: for the order of certiorari, it had not been shown that the Review Board acted in excess jurisdiction; that there is an error on the face of the record; or that there was breach of natural justice or that the Review Board failed to take into account relevant factors but took into account irrelevant factors

93. It was submitted that to the extent that the Act and Regulations specify the manner and mode in which the Review Board discharges its statutory duties and with the Review Board having discharged such duties in the manner and mode prescribed, no order of certiorari can issue against it.

94. That no appeal had been preferred against the decision of the Review Board and as the merits of that decision cannot form the subject of these proceedings, proceedings, it is only fair, just and in the interest of the wider public good and interest that the decision of the Review Board be implemented without any further delay.

95. In conclusion, it was submitted that the exparte applicant's notice of motion dated 22nd February 2017 fell short of the threshold for the grant of the orders sought hence it should be dismissed with costs.

DETERMINATION

96. I have considered all the foregoing and in my humble view, the main issue for determination in this matter is whether the exparte applicant is entitled to the judicial review orders sought. There also anciliary questions which the court will endeavor to answer.

97. The subject impugned decision relates to **Tender No. MOD/423 (01103) 2015-2016** for supply and delivery of tyres and tubes of various sizes to the Ministry of Defence for use by the Kenya Defence Forces.**T**he impugned Review Board's decision of **1st February 2017** was the second decision as a result of a rehearing ordered by the High Court in its judgment in **Judicial Review Application No. 133 of 2016** filed by the present exparte Applicants against the Review Board's decision of **4th March 2016 wherein the 2nd interested party claimed that they were not heard before a decision was made by the Review Board.**

98. In the earlier Judicial Review matter, the High Court, among others held:

'a) Having arrived at the decision that the applicants' (present interested party) right to a fair hearing were violated, it follows that it would be prejudicial to determine the issue of whether the contract had been executed by the time the application for review was made. That determination will have to wait the hearing de novo of the application for review.

Accordingly, I find merit in this Motion and I grant an order of certiorari removing into this Court for the purposes of being quashed and quashing the decision of the Respondent delivered on 4th March 2016 in PPARB Application No. 08/2016 of 12th February 2016. I further direct the Respondent to rehear the said request de novo while strictly adhering to the rules of natural justice.

99. As directed by the High Court in JR 133 of 2016, the Review Board heard all the parties. The Board reconsidered Sameer Africa's review application; the replies and submissions of all the parties who participated and delivered its 2nd decision on **1st February 2017** which decision the Applicants now challenge through these Judicial Review Proceedings.

100. The exparte applicants however claim that by the time the Judicial Review Court was giving its judgment in November, 2016, in JR 133 of 2016, the contracts entered into between the Ex-Parte Applicant herein and the Ministry of Defence had already been concluded because the parties had completed performing their obligations and the contracts were expiring. The applicant avers that even though the process had taken another turn and had become overtaken, the Ex-Parte Applicants participated and presented their submissions.

101. In the fresh decision of 1st February 2017, in which the Review Board annulled the tender No. MOD/423(01103)2015-2016, the Review Board declared null and void all actions taken thereunder and ordered a re-advertisement of that tender within 14 days of the decision. Further, that the Respondent issued directives requiring the Ministry of Defence to re-start any ongoing tender process for the year of 2017, failure to which the Respondent will thwart/overturn the process when brought before it for review.

102. The exparte applicant therefore asserts that the Respondent acted in excess of its jurisdiction, unprocedurally and irrationally when it purported to interpret the Court's decision of stay such as to annul its true implication and assign it a new meaning that would be consistent with the Respondent's own decision.

103. According to the exparte applicant, when it sought a Stay Order in JR 133 of 2016 which was granted, it went ahead to perform the signed contracts with the Procuring Entity. Unfortunately, the proceedings before the High Court took close to a year to conclude, by which time the contracts had been performed to conclusion and were expiring. The tendered items had thus been supplied and used by the Kenya Defence Forces in Somalia.

104. The circumstances under which orders of judicial review can issue were elaborated by Justice Kasule in the Ugandan Case of **PASTOLI vs. KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] EA 300 at pages 303-304** as follows:

> "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 vs. 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 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 rule expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of the State for the Hone Department {1990} Ac 876)."

105. There is the question of whether *the Review Board had the power to disregard the order of stay issued by the High Court.* This court observes that the Review Board despite receiving a stay order from the High Court in JR 133 of 2016 rubbished it and proceeded to determine the request for review as if there was no such order. It went ahead to purport to interpret the stay order and make a decision that did not take into account the said decision. This in my view, was acting in excess of jurisdiction and therefore amenable for judicial review as an inferior tribunal cannot disregard an order of a superior court of competent jurisdiction.

106. In my view, it was contemptuous of the Review Board to purport to ignore a stay Order from the High Court and that failure in itself calls for this court to intervene and exercise its supervisory jurisdiction over subordinate courts and tribunals bodies or authorities exercising judicial or quasi-judicial authority and determining the propriety of such proceedings, as espoused in Article 165 (6) and (7) of the Constitution.

107. This is not to say that where the Procuring Entity errs then it should not be faulted for example where it fails to send award notices to tender participants as stipulated in Section 87 (1) (3) of the PPAD Act, as had been determined in the earlier request for review which was subject of JR 133 of 2016. However, the Review Board is a body subordinate to the High Court and therefore is bound by the decision of the High Court. It cannot purport to interpret the decision of the High Court or question it. In the case of **Barnard vs National Dock Labour Board [1953] 1 All ER 1113 Denning LJ** stated,

> "It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the Tribunal does not observe the law, what is to be done? The remedy of certiorari is hedged around and may not be

available. Why then should the court not intervene by declaration and injunction? If it cannot so intervene it would mean that the tribunal could disregard the law." See **also Anisminic vs Foreign Compensation Commission [1969] 1 All ER 208.**

108. In ***Choitram & Others vs Mystery Model Hair Saloon (1972) EA 525*** **Madan J, (as he then was) upheld Lord Denning in** ***Barnard vs National Dock Labour Board (supra)*** and stated:

> "This is a case in which in my opinion it is right and proper in the exercise of the Court's discretion to intervene. There will be judgment for the plaintiffs for a declaration that the orders (a) and (e) made by the tribunal on 15 January 1971 without jurisdiction and are accordingly a nullity and an injunction restraining the defendants from enforcing them. On the basis of this principle, we wish to reiterate our earlier stand but since the tribunal's orders were nonexistent, they were and still were incapable of enforcement."

109. On the question of jurisdiction of the Review Board in matters where a contract had already been signed, this court agrees that the Review Board has power to entertain a challenge to the decision of the Procuring Entity even where a contract had been signed, where it is clear that the contract signing was not done in conformity with section 68 of the Act.

110. However, where such a contract had been signed and fully performed to completion, as was in this case before the decision of the Review Board was made, there would be nothing left for the Review Board to entertain and purport to reverse. It follows that the Review Board should have realized that the request for review before it had been overtaken by events, a contract having been fully performed to completion, however, irregular it was, and that therefore there would be nothing left to be nullified or to be re-advertised for tendering and or performance.

111. Under Section 68 of the PPAD Act, once a contract has been entered into, legal obligations arise between the contracting Parties and once performance is effected, there would be nothing to nullify.

112. In this case, the Procuring Entity was under a legal duty to notify unsuccessful bidders of the outcome of evaluation process just as it was under a legal obligation to notify the successful bidder. This is so, notwithstanding the fact that the unsuccessful tenderer is said to have been disqualified from the bid process at the preliminary stage for failure to furnish the Ministry with a Tax Compliance Certificate and a Form CR 12.

113. However, the tender process and contract having been signed and fully performed, it was irrational for the Review Board to direct a re-advertisement of the tender for which the tendered goods had been supplied and fully utilized by the Procuring Entity and therefore any new tender would no doubt be subject to fresh budgetary allocations and as it would be an impossibility for the Ministry of Defence to advertise for a tender for supplies which were not required or not in accordance with its procurement plan.

114. By the Review Board ordering for a re advertisement of the tender which had been fully completed and contract executed and performed fully, the Review Board was making orders in vain and compelling the Procuring Entity to do an even more illegal act, that of re advertising for a tender which was already spent.

115. As there was no material to show that those were the same goods which were due for re-advertisement for the 2017 Financial Year, it was irrational for the Review Board to direct that no other tendering process would be commenced by the Procuring Entity for the 2017 year until and unless a re-advertisement was done for the same goods which had already been supplied for use and in actual fact, fully utilized.

116. In my humble view, the Review Board exceeded its jurisdiction, acted irrationally and considered extraneous matters when it made a determination on a prospective tender process which was not subject of the Request for Review. Furthermore, the Exparte Applicant could not be guilty of disobeying or for failing to comply with an order of the Review Board, which order was stayed vide JR 133/2016.

117. Accordingly, the declaration by the Review Board that the Procuring Entity and the exparte Applicants acted illegality by failing to comply with a stayed order is an arbitrary declaration and abuse of power.

118. Therefore, in my humble view, order condemning the Applicant to pay costs to the 2 Interested Party cannot stand. It must be quashed for its arbitrariness and for being issued in insubordination of the High Court.

119. There is no denial that the supplied goods were for use by the Kenya Defence Forces (KDF) in the war against Al Shabaab in Somalia hence they were for immediate use.

120. The Court of Appeal in the **Questa Care Limited v Public Procurement Administrative Review Board & 2 others [2018]eKLR** where, on an application for stay of execution of the judgment of this court it was contended that the contract for the supply of antiretroviral drugs had already been signed and the drugs consignment was due at the port of Mombasa, and a final consignment which had been manufactured, tested and certified as fit for export done, the Court stated:

> "Clearly, when the applicants' motion and the orders sought are considered alongside these averments, there is no question that the orders sought have been overtaken by events and there is nothing more that this court can do.
>
> Needless to say, the applicant has argued that since this court certified the application as urgent, it should take into account that the award of the contract was unlawful, and grant the orders sought retrospectively, from the date the application was filed. Much as we appreciate the predicament in which the applicant finds itself, since the orders sought were specifically for an injunction to stay the signing of the tender contract, and execution of the contract, a party is bound by its pleadings, and we are in no position to make orders of which have not been prayed."

121. The Court of Appeal in the above Questa Care case also referred to the case of **East African Cables Limited vs Public Procurement Complaints, Review and Appeals Board &another[2007]eKLR** where the Court of Appeal stated:

> "We think that in the particular circumstances of this case, if we allow the application, the consequences of our orders would harm the greatest number of people. in this instance, we would recall that the advocates of utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action, and if we are comparing the ethical quality of two ways of acting, then we should chose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

122. The Court of Appeal in the above case held that *it was improper to stop the supply of antiretroviral drugs which are for the benefit of HIV/AIDS patients in Kenya who are in dire need of this medication and that any further interruption to its supply would lead to greater harm and suffering of those in need.*

123. This Court appreciates under Section 173 of the Act on the powers of the Review Board include annulment of the awards, cancellation of contracts signed, where such a process was flawed. Nonetheless, where the contract is already performed as was in this case pursuant to a stay order of the High Court in JR 133 of 2016, then there would be nothing to nullify or cancel. It is therefore unfortunate that the Review Board went to that extend of making orders in vain and purport to force the implementation of the said orders by the procuring entity through threats of consequences on future processes and condemning parties to pay costs, when implementation of the signed contract was pursuant to a Court order.

124. In my humble view, the stay order made by the Court in JR 133 of 2016 must have been informed by the principle in the **EA Cables Ltd [supra]** in that the KDF supplies were urgently needed for use by the team in Somalia and therefore stay of supplies would have adversely affected the Operation *Linda Nchi* programme in Somalia. Matters defence of the sovereignty of a nation are not matters that can be taken lightly. They involve life and limb of people of a nation. Delays in supply of needy supplies is tantamount to exposing the Defence Forces to higher risks of being subdued by the enemy.

125. Therefore, it is my humble view that where the Review Board clearly nullified a contract which was already implemented and where there was nothing to be annulled, then the Review Board fell into error by issuing orders in vain hence this Court has the power to quash such orders which are made in vain and which amount to publicity stunts – **See Questa Care (C.A.)** supra case.

126. On allegation that this matter is Res-judicata J.R. 133/2016, it is my humble view that the contention is misplaced as the proceedings herein are not derived from the same decision as that which was impugned in the proceedings in J.R. 133/2016 wherein the Learned Judge referred back the matter to the Review Board for reconsideration after giving all the affected parties an opportunity to be heard and castigated the Review Board for acting illegally and against the Rules of Natural Justice by failing to ensure that the Exparte Applicant was served with the request for Review pleadings as stipulated in Section 170 of the PPAD Act and for cancelling the tender awarded to the Applicant without according it a hearing.

127. Further, as the request for review was new as directed by Justice Odunga in JR 133 of 2016, a later decision of the Review Board could only be challenged through fresh judicial review proceedings. To hold otherwise would be denying the exparte applicants and any other affected parties an opportunity to ventilate their grievances contrary to Article 50(1) of the Constitution.

128. Albeit it is alleged that the exparte Applicant had been servicing an illegal contract arising out of a tender process despite a stay order issued by the Review Board, what this Court observes is that had the 2nd interested Party and the Review Board sought to vacate the stay order of the High Court in the first instance, the situation would be different in that there would have been no performance of the contract signed between the Procuring Entity and the Exparte Applicant.

129. Furthermore, it was during the time when there was stay orders in place against the orders of the Review Board by the High Court in JR 133/2016 that contracts were performed. This Court not being an Appellate Court in Judicial Review matters, it cannot review the decision of the Superior Court which ordered for a stay. It was upon the aggrieved Parties to challenge those stay orders, which they did not. They cannot be heard to complain before this Court at this stage.

130. This court further notes that the Respondent's depositions by Henock Kirungu as contained in the Replying affidavit challenging these proceedings are mere denials. He makes abstract depositions which are generalized and not specific to the serious issues raised by the exparte Applicant.

131. Only the 2nd Interested Party attempted to defend the action of the Review Board and to justify the decision by the Review Board. This court finds no evidence of collusion between the Applicant and the 1st Interested Party Procuring Entity to fail to notify the 2nd Interested Party of the outcome of Evaluation process.

132. There is clear evidence on record that during the period of stay pending hearing and determination of the Judicial Review Application No. 133/2016, the exparte Applicants proceeded to order for the tendered items and supplied them in full performance of the contract signed with the procuring Entity. And that by the time the Court was delivering its judgment in November 2016, the contracts entered into between the Exparte Applicant and the Ministry of Defence– Procuring Entity had already been concluded because the Parties had completed performing their obligations and contracts were expiring and have since been spent.

133. This court finds the impugned decision of the Review Board to be Wednesday unreasonable in that a fresh decision nullifying the tender and declaring null and void all actions taken thereunder and ordering for re-advertisement of that tender within 14 days of the decision was made oblivious of the tender having been fully been performed. That in my view was an absurd decision incapable of enforcement.

134. The decision of 1.2.2017 was made in the full knowledge that the contract had fully been performed and there was nothing left to be prohibited or overturned.

135. Any advertisement for re tender would be subject of a totally new and different tender hence the order was pre-posterous, barren of any substance and intended to achieve nothing.

136. A directive to restart any ongoing process for 2017 and that in default, the Review Board to overturn the process when brought for review is a veiled threat to intimidate the Procuring Entity from performing its mandate of providing public services to the people of Kenya as the Procuring Entity is a public office.

137. I reiterate that the Review Board has power to annual and cancel a contract – that is signed pursuant to a tender process which the Review Board finds flawed. However, it would be superfluous to cancel a contract that has fully been performed or executed to completion as was in this case where the supply of the tendered items had been made and the items being consumables had already been utilized hence to re-advertise the tender which had been overtaken by events was an exercise in futility. In my view, failure to nullify the tender which is fully performed cannot be said to be sanitizing of an irregular illegal null and void process.

138. The Review Board could even if it found the tender process which had been completed and contracts signed and executed to be irregular illegal, null and void, it should have simply made its observations on the matter and made a finding on what it would have held had the contracts not been fully performed.

139. In my humble view, the Respondent's holding that the stay order did not have the effect ***'of staying'*** and that the Ex-parte Applicants were bound by the impugned decision and process of the Respondent, was in total disregard of the Court order staying the impugned decision of the Respondent.

140. Further, the order of the Respondent condemning the Ex-Parte Applicants and the 1st Interested Party for not complying with the stayed decision and punishing them with an order of costs in favour of the 2nd Interested Party, was arbitrary, irrational and ultra vires.

141. In the end, I find and hold that the judicial review proceedings herein are merited. Prayer 1 of the Notice of Motion is hereby allowed granting the order of Certiorari. Accordingly, *An order of Certiorari is hereby issued removing to this Honorable Court for the purposes of being quashed and I hereby quash the decision of the Public Procurement Administrative Review Board (Review Board) made on the 1st February 2017 in Application No. 8 of 2016.*

142. As the entire decision has been quashed and the slate wiped clean, there is nothing else left to be prohibited. Accordingly, the prayer for prohibition is declined.

143. On costs, as these proceedings basically were initiated to correct a record that was clearly erroneous. I exercise my discretion and order that each party shall bear their own costs of these proceedings.

Dated, Signed and Delivered in open court at Nairobi this 4th Day of October, 2018.

R.E.ABURILI

JUDGE