REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 309 OF 2018

IN THE MATTER OF AN APPLICATION BY CENTRAL KENYA

FRESH MERCHANTS LIMITED FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE DECISION BY THE PUBLIC

PROCUREMENT AND ADMINISTRATIVE REVIEW

BOARD IN APPLICATION NO. 86 OF 2018.

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW

REFORM ACT, CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 175(1) OF THE PUBLIC

PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF ARTICLES 10, 22, 23(F), 43 (1) (A), 50(1),

165(60 & (7) AND 227 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF PART 111 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF REQUEST FOR REVIEW OF TENDER NO. MOD/423(0110135)2017/2018

FOR SUPPLY OF MILLED RICE TO THE DEFENCE FORCES

BETWEEN

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

PRINCIPLE SECRETARY,

MINISTRY OF DEFENCE.....2ND RESPONDENT

AKAMAI CREATIVE LIMITED.....3RD RESPONDENT

CENTRAL KENYA FRESH

MERCHANTS LIMITED.....EX-PARTE APPLICANT

JUDGMENT

Introduction.

1. I find it convenient to start by paraphrasing what I stated in *Republic vs Public Procurement Administrative Review Board and 2 Others ex parte Pelt Security Services Limited.**[1]*** *First,* tendering plays a vital role in the delivery of goods and services in our society. It is for this reason that the Constitution obliges organs of state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective.[2] Where the procurement process is shown not to be so, courts have the power to intervene.

2. Second, public procurement law contains the principles, policies and procedures that guide contracting public authorities and entities that buy works, goods or services on the market, with a view to ensure that public funds are spent efficiently, effectively, in a non-discriminatory and competitive manner, through transparent tendering processes.

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

4. Fourth, the Public Procurement and Asset Disposal Act[3] (hereinafter referred to as the Act) and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations) prescribes the framework within which procurement policy must be implemented. A decision to award a tender constitutes administrative action so the provisions of Article **47** of the Constitution and the Fair Administrative Action Act[4] from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[5]

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

6. Section **28** of the act provides that the functions of the Review Board shall be—

> (a) reviewing, hearing and determining tendering and asset disposal disputes; and
> (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

7. Perhaps I should add that statutes do not exist in a vacuum.[6] Lord Steyn candidly put it when he quipped ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a liberal democracy based upon the traditions of the common law and, unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.’’[7] It is correct to state that statutes are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[8] The courts should therefore strive to interpret powers in accordance with these principles. As Baroness Hale suggested, "the rule of law may have become ‘‘the ultimate controlling factor in our…constitution.’’[9]

8. It is beyond argument that a Judicial Review court will perfectly be entitled to review a decision if it is flawed. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

9. The purpose of Judicial Review remedies is to afford a prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. The court's role in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-

maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers. The court will also be acting as a guardian of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

10. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[10]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

The application.

11. The genesis of the *ex pare* applicant's application is that the first Respondent (herein after referred to as the Review Board) allowed the third Respondent's Request for Review in Application Number **86** of 2018 on **24th** July 2018 and annulled the tender awarded to the *ex parte* applicant. It ordered that since the third Respondent's Tender was fully evaluated, and, was the most responsive tender as established in its ruling, it directed the Procuring Entity to issue a letter of award of the subject tender to the third Respondent within **14** days from the date of the decision.

12. Aggrieved by the decision, the *ex parte* applicant instituted these Judicial Review proceedings under section **175** of the act seeking orders *of **Certiorari** to quash the said decision and to prohibit and/or restrain the second Respondent from awarding the tender and/or signing any contract with the **3rd** Respondent in tender number MOD/423 (0110135) 2017/2018 for the supply of milled rice to the Defence Forces.*

The grounds upon which the application is founded.

13. The grounds in support of the application can be summarized as follows:-

a. That the decision is illegal for want of jurisdiction, and that the Review Board failed to lawfully invoke its powers under section **167** of the Act.

b. That the Review Board acted in excess of its jurisdiction by embarking on evaluation of the tenders, a preserve of the procuring entity.

c. That the Review Board took into consideration irrelevant matters in that it considered KEBS reports as a criteria for evaluation yet the tender document did not provide for the said report to serve as a criteria for evaluation and by so doing, it arrived at a wrong decision.

d. That in evaluating the tenders, the Review Board introduced a strange measure and found the 3rd Respondent to be "the most responsive bidder" which was not part of the tender conditions.

e. That in ordering the procuring entity to award the tender to the third Respondent within **14** days, the Review Board failed to consider the right of the successful tenderer to apply to Judicial Review pursuant to section **175** of the act.

f. That by proceeding to hear and determine the Request for Review on merits, the Review Board failed to uphold the mandatory provisions of Regulation **73** which limited its jurisdiction, and, also, failed to adhere to the doctrine of stare decisis which dictated thatit is bound the holdings of this court to the effect that a resolution authorizing an action by a limited liability company ought to be filed with the action and if not, it ought to be filed before the suit or matter is fixed for hearing.

g. That in ordering the third Respondent to be issued with a letter of award within **14** days from the date of the decision, the Review Board failed to take into account the provision in the tender document (2.27) dictating that the procuring entity undertakes a determination of the lowest evaluated tenderers capabilities prior to the award.

h. That in focusing on the KEBS report as a criteria for the evaluation, the Review Board took into account notes made by hand well after the reports were prepared and signed by the expert which notes were extrinsic matters made by an undisclosed individual.

i. That in upholding the KEBS report as a parameter of evaluation, the Review Board introduced a requirement that was not part of the tender document, by stating "the successful bidders ought to have been rejected more particularly owing to the sensitivity of the procurement in issue that requires food samples to be of the highest quality," and that the Review Board had no capacity to determine the quality of the sample provided by the ex parte applicant nor did it have capacity to interpret the lab reports.

j. That the Review Board shifted the burden of prove by stating 'neither the procuring entity nor the successful bidder produced any expert opinion to show that the rice whose sample was submitted by the successful bidder was fit for human consumption.'

k. That *the Review Board introduced unknown requirements when it stated that it was satisfied that on the basis of the evidence before it, the sample provided by the successful bidder did not comply with the requirements set out in the tender document, and, that, it introduced a condition precedent to the award which was not part of the tender documents, hence, took into account a matter that it ought not to have taken into account by stating that 'the award was subject to KEBS report.*

14. Additionally, **Mr. Ahmed Abdullahi Mohamed,** in the supporting Affidavit avers that the impugned decision is unfair in so far as the Review Board relied on Kenya Bureau of Standards (KEBS) results to rule in favour of the third Respondent. He averred that the ex parte *applicant fully complied with the mandatory requirement of clause **8** on providing samples, hence, its tender was fully responsive as per*

terms of the tender document. Also, he averred that the tender documents did not outline any specific requirements regarding the composition of the Milled Rice nor did it provide for rating of the samples, and, whether the rating would form part of the evaluation criteria. He averred that the Review Board crafted or imagined an evaluation criteria other than those clearly set down in the tender document.

The first Respondent's Replying Affidavit.

15. The first Respondent's Secretary, **Mr. Hennock Kirungu** swore the Replying Affidavit dated **12th** October 2018. He averred that the third Respondent filed a Request for Review challenging the second Respondent's decision dated **24th** July 2018 in Tender No. MOD/423 (00110135)2017/2018 for the supply of Milled Rice to the Defence Forces. He averred that the Review Board only took into consideration facts presented before it which were relevant in deciding the issues. Also, he averred that the Review Board identified and determined the following issues, namely; (i) whether the applicant's Request for Review was incompetent; and, (ii) whether the Procuring entity evaluated the applicant's and the successful bidder's tenders in compliance with the provisions of the act, the Regulations and the Tender document.

16. **Mr. Kirungu** averred that the decision was based on its findings that although the applicant's Request for Review as initially filed was not accompanied by a statement setting out facts upon which the applicant was objecting to the decision of the procuring entity, the applicant subsequently filed two affidavits dated **17th** and **19th** July 2018 sufficiently putting forward its case. He averred that the Review Board was satisfied on the basis of the evidence placed before it that:- (a) the sample provided by the successful bidder did not comply with the requirements set out in the Tender Document; and, (b) that the procuring entity breached the provisions of the act, the Regulations and the Tender Document by purporting to award the tender to the successful bidder.

17. He averred that in making the decision, the Review Board considered all the documents of evidential value placed before it and the submissions, and that, the decision was made within the Review Board's statutory mandate. **Mr. Kirungu** also averred that the ex parte applicant has not demonstrated that the Review Board was unreasonable in arriving at its decision or that it was guilty of unreasonable exercise of power or irrationality. He averred that the decision is grounded on law, and, that, the ex parte *applicant has not demonstrated illegality, impropriety of procedure and irrationality and that the application is made in bad faith and lacks merit.*

Second Respondent's Replying Affidavit.

18. On behalf of the second Respondent, **Major Vitalis Lumbasi**, a Commissioned Officer deployed as Staff Officer 11 swore the Replying Affidavit dated **27th** August 2018. He stated that he is duly authorized by the Principle Secretary, Ministry of Defence to swear the Affidavit. He averred that the ex parte *applicant was the successful tenderer, and, that, the Review Board acted in excess of its jurisdiction by purporting to conduct fresh evaluations and award the tender.*

19. Major **Lumbasi** also averred that annexture **FK2** attached to the third Respondent's Replying Affidavit is unknown and strange to the second Respondent, and, that the Review Board lacked jurisdiction to award the tender, hence, it acted beyond its jurisdiction. He also averred that the procuring entity's tender evaluation committee recommended the tender to be awarded to the ex parte *applicant being the lowest evaluated bidder.*

20. Major Lumbasi also averred that none of the rice samples was found to be unfit for human consumption and that the Review Board failed to take into account the Evaluation Committees Report and analysis on the highest scorer, and, failed to note that the *ex parte applicant was not only the lowest bidder, but, also the most responsive therefore the most successful one having passed all the physical and financial evaluations.*

21. Further, he averred that the Review Board acted ultra vires *by purporting to interpret and rely on the KEBS Laboratory Test Reports in the absence of an expert opinion as to the suitability of the samples and proceeded to annul the tender and set aside the award. Also, he averred that it was unreasonable and irrational for the Review Board to ignore and overlook the fact that the ex parte applicant was the lowest evaluated bidder.*

22. Mr. Lumbasi also averred that in awarding the tender to the third Respondent, the Review Board relied on section **173(b)** of the act, a provision which is limited to giving direction to procurement entities but does not empower the Review Board to review the tender and award the same. He averred that the procurement entity acted within the law and the tender provisions while evaluating and adjudicating the tender and there was no breach of the act and Regulations, hence, the Review Board acted *ultra vires.*

23. Answering the accusations of contempt of contempt premised on the LPO's showing that rice has been supplied after the nullification of the award, **Mr. Lumbasi** averred that the third Respondent's tender having expired, the Review Board could not source rice from the third Respondent "as there would be complications in payment."

Third Respondent's Replying Affidavit.

24. Francis Kariuki Ndiga, the third Respondent's Chief Executive Officer and its Director swore the Replying Affidavit dated **13th** August 2018. He averred that the ex parte applicant and the second Respondent are in contempt of court for deliberately disobeying the decision of the Review Board dated **24th** July 2018 by illegally issuing three LPO's for the supply of rice valued at **Ksh. 39,000,000/=** under the tender the subject of this suit despite being aware of the decision annulling the award to the ex parte *applicant. As a consequence, he avers that these proceedings are an abuse of court process.*

25. He also averred that the ex parte *applicant's rice failed the KEBs Laboratory test is vindicated by the fact that the ex parte applicant has illegally supplied Milled Rice Grade **3** instead of the tender specification of Milled Rice Grade **2** specified under the subject tender in violation of sections **175(6)** and **176(1) (m)** of the act. He annexed a photograph of the packaging material in support of this averment.*

26. Mr. ***Ndiga*** *averred that having committed contempt, the ex parte applicant has no audience before this court. Further, he averred that the ex parte applicant has not established any factual or legal basis to demonstrate that the impugned decision is illegal or without jurisdiction or contrary to the law. Further, he averred that the objection that the Request for Review was not accompanied by a resolution was considered and the Review Board was satisfied that the requisite authority was attached to the Replying Affidavit.*

27. Mr. Ndiga also averred that the jurisdiction of the Review Board was properly and lawfully exercised in conformity with section **167** of the act. He further averred that the *ex parte applicant seeks to challenge the merits of the decision which is outside the purview of Judicial Review Jurisdiction. Also, he averred that the Review Board properly exercised its legal mandate when it examined the evaluation process undertaken by the second Respondent to ascertain whether it complied with the law. Further, he averred that the Review Board did not evaluate the tender, and, that, it examined the documents before it including the evaluation report, the KEBS Laboratory test reports for all the tenderers and the notification of tender result letters.*

28. Additionally, he averred that the second Respondent ignored and breached the requirements contained in the tender documents, the act and the Regulations by purporting to award the tender to the ex parte *applicant. Further, he averred that the Review Board took into account relevant matters as per clause **8** of the Appendix to Instructions to Tenderers and clause **3.8** of the General Conditions of the Contract that gave the second Respondent the right to inspect and or test the goods to confirm their conformity with the contract specification and the specification for the supply of Grade **2** Milled Rice.*

29. Further he averred that the requirement for testing of the rice samples contained in the tender document was not an exercise in futility but is a mandatory requirement anchored in law as provided under Regulation **49(1).** He also averred that the Review Board noted in its decision that the second Respondent conceded that the KEBS Laboratory Test Report was one of the tender requirements. Also, he averred that the successful bidder's test report indicated that it failed the test, hence, the ex parte *applicant has no basis to challenge the impugned decision.*

30. Mr. Ndiga also averred that the Review Board was within its mandate by examining the KEBs reports, and, that, the Review Board established that only three bidders passed the KEBS Lab Test. Also, he averred that the second Respondent was required to compare each tender with the technical requirement of the description of goods which is the basis for the technical evaluation. **Mr. Ndiga** further averred that it is the second Respondent who provided the Review Board with the KEBS Lab test reports that contained the comparison marks on each test report, and, that, the *ex parte applicant's rice sample failed **2** of the **9** parameters required as specification. He also averred that it is a mandatory requirement that under Regulation **51(1)(c)** that the report prepared by the second Respondent must contain the results of the technical evaluation under Regulation **49 (1).***

31. Mr. Ndiga additionally averred that the Review Board did not rely on any extrinsic evidence in arriving at its decision. He averred that the second Respondent violated Regulation **49(2)** by failing to reject all the tenders whose rice sample failed the KEBS Lab Test. Also, he averred the second Respondent erred by awarding a tender to a party whose tender was not responsive in violation of section **80** of the act which requires that only responsive tenders are evaluated.

32. Further, he further averred that section **79(1)** of the act defines a responsive tender as one which complies with all eligibility and mandatory requirements of the tender documents. Also, he averred that the ex parte *applicant's tender was not responsive as its rice sample failed the test, hence, the Review Board did not introduce an unknown requirement when it held that the sample provided by the successful bidder did not comply with the requirements set out in the tender documents. He stated that the procuring entity breached the provisions of the act and the Regulations.*

33. Mr. Ndiga further averred that in view of Regulation **49(1)(2),** the Review Board did not introduce a condition precedent to the award as there is a legal requirement that all tenders are subject to technical evaluation and in the case of the rice, it was a mandatory requirement. Also, he averred that the Review Board noted that the award of the tender was subject to KEBS Report, hence, it properly and legally exercised its statutory and constitutional mandate in examining the second Respondent' evaluation of the tender to ensure that the process complied with the applicable law and all criteria stipulated in the tender document. He also averred that the procuring entity failed to adhere to the law and tender documents.

34. Mr. Ndiga also averred that the *ex parte applicant was given a fair hearing and filed all the required documents and that the impugned decision considered all the parties submissions.*

Ex parte applicant's Supplementary Affidavit.

35. In reply to **Mr. Ndiga's** Replying Affidavit, **Mr. Ahmed Abdullahi Mohmed** swore the supplementary Affidavit dated **22nd** August 2018. He averred that the ex parte *applicant has not in any way acted in a manner prejudicial to the impugned decision or in contempt of the decision nor has it signed a contract for the supply of the tender. He averred that the LPO's referred to were issued for the supply on a temporary basis and were accepted in good faith.*

36. **Mr. Mohamed** also averred that the third Respondent is not entitled to a contract unless and until this court so finds and that the Request for Review was not filed with the supporting Affidavit. Further, he averred that the requirement for sample testing ought to be understood in the context of clause **3.8** of the general conditions applicable between the successful tenderer and the procuring entity.

***Third R*espondent's Further Affidavit.**

37. In reply to **Mr. Mohamed's** supplementary Affidavit and **Major Lumbasi's** Replying Affidavit, **Mr. Ndiga** swore the further Affidavit dated **17th** September 2018 stating that the second Respondent has admitted being issued with LPO's for the supply of rice under the tender the subject of these proceedings, hence, the second Respondent has aided/ abetted an illegality since it cannot legally procure any goods and services without adhering strictly to the provisions of the act, and, and that, it has violated section **176 (1)** of the act.

Submissions.

38. Counsels for all the parties written submissions and also made oral arguments except **Miss Chimau** for the first Respondent who did not file written submissions or submit orally. She only adopted the first Respondent's Replying Affidavit.

Issues for determination.

39. From the diametrically opposed positions presented by the parties, I find that the following issues distil themselves for determination, namely:-

a. Whether the third Respondent is guilty of contempt of court and, if so, whether it ought to be denied the right of audience.

b. Whether the third Respondent's Request for Review was competent.

c. Whether the Review Board usurped the functions of the procuring entity.

d. Whether the impugned decision is tainted with illegality.

e. Whether the Review Board took into account irrelevant matters and/or ignored relevant matters.

a. Whether the third Respondent is guilty of contempt of court, and, if so, whether it ought to be denied the right of audience.

40. Mr. Thuo, the third Respondent's counsel argued that the ex parte applicant is in contempt of court for deliberately violating the Review Board's decision rendered on **24th** July 2018-the subject of these proceedings-which nullified the award of the tender to the ex parte *applicant. **Mr. Thuo** argued notwithstanding the fact that the said order is still in force, the ex parte applicant colluded with the second Respondent who issued it with LPO's to supply the rice on the strength of which it supplied rice worth **Ksh. 39,000,000/=** in violation of the said order.*

41. Mr. Thuo submitted that the act of supplying the rice contrary to the court order is a violation of section **175 (6)** and **176 (1) (m)** of the act. He insisted that in view of the said contempt, the *ex parte applicant has no right of audience before the court.*[11]

42. In response to the above assault, **Mr. Ingutya,** counsel for the ex parte *applicant argued that the* ex parte applicant's right to approach the court is entrenched in Article **50** of the Constitution, and, that, pursuant to Article **47** of the Constitution and the Fair Administrative Action Act,[12] *the ex parte applicant has the right to benefit from the jurisdiction of this court. He also argued that section **175** of the act makes provision for an aggrieved party to commence Judicial Review proceedings.*

43. In the same vein **Mr. Ingutya** submitted that the ex parte *applicant concedes receiving the LPO's but denies signing a contract. He argued that the rice supplied was not based on the award of the tender or stipulations of a signed contract pursuant to the tender proceedings. He contended that the ex parte* applicant "was requested to supply rice as a matter of urgency" and, that, "*The requisition was made due to necessity."*

44. Mr. Ingutya contended that the troops had to be fed, hence, the urgency. **Mr. Ingutya** added that section **175** of the act "properly interpreted implies that the commencement of Judicial Review proceedings holds in abeyance the decision of the Review Board in the same way as the filing of a Request for Review before the Board holds in abeyance further tender proceedings by a procuring entity including award of contract."

45. Mr. Mate for the second Respondent submitted that the procurement of the rice was occasioned by an urgent need.

46. It is undisputed that the *ex parte* applicant's tender was nullified. The order remains in force until and unless set aside by this court. In recognition of this basic truth, the *ex parte* applicant moved to this court seeking to review the said order. If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them into disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.

47. It is essential for the maintenance of the rule of law and order that the authority and the dignity of courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.[13]

48. The authority and dignity of courts must be upheld at all times. This differentiates civilized societies from those applying the law of the jungle. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.[14] **The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would be left in place to serve as a guarantee for legality, and**

for the rights of all people.[15]

49. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. It is a crime to unlawfully and intentionally to disobey a court order.[16] The offence has in general terms received a constitutional 'stamp of approval',[17] since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'[18] While A litigant seeking enforcement of a court order has a manifest private interest in securing compliance, the court grants enforcement because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

50. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fides*.'[19] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. [20] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).[21] The offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority. [22] The Constitutional Court of South Africa,***[23]*** underlined the importance to the rule of law, of compliance with court orders in the following terms:-

> "Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

51. I now address the invitation to deny the *ex parte* applicant audience. The court of Appeal in *A.B & another v R.B*[24] observed that under our constitutional framework, there is no general rule that a court cannot hear a person(s) in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article **50(1)** of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster.[25]

52. Way back in 1952, Lord Denning, LJ. articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to a fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril.[26] *In Hadkinson vs.Hadkinson****,[27]*** which was also cited by **Mr. Kanai** in support of his objection, the eminent Law Lord stated:-

> "I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

53. In *Rose Detho v. Ratilal Automobiles Ltd & 6 Others****,[28]*** the Court of appeal emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, *Githinji, JA* expressed himself as follows:-

> "Has the contemnor a right to be heard. This is indeed an everyday question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to the general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt"(Emphasis added)

54. Further Githinji JA went further to state that:-"The courts in this country, both this court and superior court, have adopted the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning L.J. in Hadkinson's case (Supra)"

55. The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened. The constitutional court of South Africa,***[29]*** underlined the importance to the rule of law, of compliance with court orders in the following terms:-

> "Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

56. In exercising the discretion the court will have to satisfy itself on the question *"whether, taking into account all the circumstances of the case, it is in the interests of justice to hear or not to hear the contemnor."* Refusing to hear a contemnor is a step that the court will only take where the contempt himself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Justice Denning in *Hadkinson v Hadkinson****[30]*** and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make.

57. If such an order is disobeyed or not complied with, the court may refuse the party violating such order to hear him on merits. It is clear on the true construction of the law and from established practice that the court has a wide discretion to do what is just and reasonable in the circumstances to ensure proper administration of justice[31]bearing in mind that the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law.

58. Parliament in its wisdom, in order to ensure compliance of orders of the Review Board and the need to keep the procurement process free from malpractices, included section **175 (6)** of the act which provide that *"A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void."*

59. It follows that the procurement the subject of the LPO's in question to the extent that it was undertaken contrary to the award of the decision of the Review Board is null and void by dint of the above section.

60. As a justification for the sad supply, the *ex parte* applicant's counsel and the second Respondent's counsel cited urgent need for the rice to feed the troops. Curiously, they forgot that section **103 (2)(b)** of the act provides for direct procurement in the event of war, invasion, disorder, natural disaster or if there is an urgent need for the goods, works or services, and engaging in tendering or any other method of procurement would therefore be impractical. Specifically, the said counsels forgot that there is a condition precedent to be satisfied under the said section. The proviso to the section provides that *"the circumstances were neither foreseen by the procuring entity nor the result of dilatory conduct on its part."* Despite this clear statutory dictate, there was no attempt to bring the supply within this proviso. It follows that the supply of said rice cannot be read in a manner consistent with section 103 (2) (b) of the act.

61. Additionally, section **176 (1) (m)** of the act provides that a person shall not contravene a lawful order of the authority given under Part **IV** (Powers to Ensure Compliance) or the Review Board under Part **XV**(Administrative Review of Procurement and Disposal Proceedings). To me, the purported supply is a clear contravention of the provisions contained in the above provisions.

62. The casual manner in which the supply was explained by the *ex parte* applicants and the procuring entity's counsels and the failure to bring the procurement within the provisions that permit direct procurement is not only worrying but displays unacceptable disrespect of procurement laws and willful disobedience of court orders, a threat to the principle of the Rule of Law, a core value in our constitutional dispensation and one of the pillars in Article **10** of the Constitution. The conduct and/or the procurement cannot be read in a manner that is consistent with the Constitution.

63. It is important to mention that the procuring entity is bound by the principle of legality. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. As such, the procurement entity's actions must conform to the doctrine of legality.

64. Public procurement process must meet constitutional tests. The Constitution is binding on all citizens. It is this willful and carefree disobedience of the Constitution and engagement in illegal procurement processes that this court cannot condone. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> "(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"***[32]***

65. The ex parte *applicant cannot move to court to Review the decision of the Review Board, and, at the same time be permitted to perpetuate an illegality by supplying rice under the annulled award or in any other manner not permitted by law. It cannot seek to benefit from the established legal process and at the same time engage in a process that undermines the judicial process. The procuring entity cannot in the same vein be seen to be assisting a tenderer the detriment of other tenderer, and worse still, in contravention of a court order and procurement law.* Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

66. The question that naturally follows is what action can this court take in the circumstances. The answer is simple. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds that the Review Board acted wrongly, it does not have to grant any remedy to the *ex parte* applicant. Examples where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or, where the applicant has not acted in good faith, or, where there is breach of a court order as in this case, or where a procurement and supply have been done in a manner not consistent with the law as in this case, or engaging in actions that undermine due administration of justice or abuse of judicial proceedings or where a remedy would impede the authority's ability to deliver fair administration. In short, the circumstances discussed above disentitle the *ex parte* applicant the exercise of courts discretion in its favor in considering whether or not to grant the Judicial Review orders sought.

b. Whether the third Respondent's Request for Review was competent.

67. Mr. Ingutya argued that *the Review Board acted without jurisdiction because there was no competent Request for Review before it. He argued that the Request for Review was not accompanied by a statement as required under section **167** of the act and Regulation **73**[33] nor was it accompanied by a company resolution.*[34] *He also stated that it was not signed under the seal of the company.*

68. Mr. Mate, counsel for the second Respondent did not address this issue.

67. In response, **Mr. Kanai's** *submitted that the Review Board acted within its jurisdiction, and, that the third Respondent's Request for Review was competent in that it complied with Regulation **73.** He cited section **72** of the Interpretation and General Provisions Act*[35]

which provides that:-

> "Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

70. Mr. Kanai *argued that the case of R vs Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company (K) Ltd & Another**[36]** cited by the ex parte applicant (herein after referred to as the Britam case) is distinguishable from this case in contest was whether a letter was a competent Request for Review.*

71. On the alleged absence of a company resolution, **Mr. Kanai** argued that it was filed prior to the hearing. He pointed out that in Leo Investments Ltd v Trident Insurance Company Ltd[37] *cited by the ex parte applicant's counsel, the court stated that the resolution may be filed any time before the suit is fixed for hearing. Also, he argued that there is no requirement that the same be filed at the same time as the suit, and, that, it's absence is not fatal. He argued that the Review Board correctly dismissed the ex parte applicant's objection on this ground. He also argued that the Request for Review was properly signed by a advocate.*

72. Further, **Mr. Kanai** pointed out that the case of *Bugere Sugar Factory Limited v Sebaduka cited by the ex parte applicant's counsel is no longer good law because it has since been overturned by the Ugandan Supreme Court in United Assurance Co Ltd v A.G*[38] *cited in Fubeco China Fushun v Naiposha Company Limited & 11 Others.*[39] *Overturning the said decision, the Ugandan Supreme Court stated "it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf of the company, and in the names of the company. Any director, who is authorized to act on behalf of that company, unless the contrary is shown, has powers of the board to act on behalf of that company."*

73. From the above opposing arguments, one broad issue arises, that is, whether the third Respondent's Request for Review before the Review Board was competent, and, whether the Request for Review was incompetent for want of company Resolution and for failure to be signed under the company seal.

74. I find it apposite to address the relevancy or otherwise of the authorities cited by the ex parte *applicant's counsel. The ex parte applicant's counsel placed heavy reliance on the Britam case which* I had the benefit of determining. The contest in the said case was whether *"a letter was a competent Request for Review"* and, if so, whether it was filed within the **14** days stipulated under the law. Certainly, this is not the question before this court. Before this court is the question whether the Request for Review was incompetent since it was not accompanied by a statement, and whether the first Respondent acted without jurisdiction since there was no competent Request for Review before it. Another question is whether the absence of a company resolution authorizing the filing of the proceedings renders the Request for Review incompetent.

75. Clearly, the circumstances in the cited cases and the instant case are totally different. I have severally stated in my determinations that it is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[40]

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

76. The ratio of any decision must be understood in the background of the facts of the particular case.[41] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[42]Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[43] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[44] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[45] I find no difficulty in concluding that the facts in the *Britam* case cited by the *ex parte* applicants counsel are irrelevant to the circumstances of this case.

77. Section **167 (1)** of the Act provides that *"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review **within fourteen days** of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."*

78. It is common ground that the *ex parte* applicant raised these same grounds before the Review Board. In its determination, the Review Board stated that *"The Board has considered the submissions made by all the parties regarding the issue of the competence of the Request for Review."* The Review Board considered and found that the Request for Review before it was competent. Regarding the resolution, the Review Board found that although the resolution was not filed together with the Request for Review, the resolution was filed before the Request for Review was heard. It referred to the two affidavits filed subsequent to filing the Request for Review.

79. Further, on the question of the absence of a company resolution authorizing the filing of the Request for Review, the authorities cited by the *ex parte* applicant do not support his argument. The correct legal position is that failure to file a resolution is not fatal. It can be filed anytime before the hearing. In fact, that is the holding in the same authorities the *ex parte* applicant's counsel cited. Lastly, a Request for Review can be signed by the applicant or his advocate. In this case it was said to have been signed by an advocate. The argument that it did not have a company seal fails.

80. By challenging the Review Boards finding on the issue under consideration, the *ex parte* applicant is inviting this court to delve into a merits review. There is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under the Fair Administrative Action Act[46] or under the traditional common law grounds for Judicial Review which are still applicable by dint of section **12** of the Fair Administrative Action Act.[47] This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under the Fair Administrative Action Act[48] has been established. The invitation by the *ex parte* applicant's counsel to this court to fault the Review Board on its finding on the issue under consideration is in my view a merit review invitation which is outside the purview of this court's Judicial Review jurisdiction. I decline the invitation to delve into the prohibited sphere.

c. Whether the Review Board usurped the functions of the procuring entity.

81. Mr. Ingutya submitted that *the Review Board embarked on an evaluation, a preserve of the Evaluation Committee under sections **80** and **85** of the act. He argued that the Board's powers under section **173** of the act do not extent to vesting it with jurisdiction to evaluate tenders and make an award. He argued that the Board examined the evaluation report together with the KEBS Lab Test Reports for all bidders which amounted to embarking on a fresh evaluation, by using the reports which the evaluation committee had not used. He argued that in the process Review Board set a criteria which was not in the tender documents.*

82. **Mr. ingutya** argued that there was nothing in clause **8** dictating that the sample had to be of the highest quality or meet certain specifications. He contended that the Review Board misconstrued the reasons for the sample. His contention was that the samples were meant to confirm that the rice to be supplied would meet the contract specifications. He argued that the requirement was for two kilograms of sample rice to be delivered, hence, his clent's tender was responsive since it conformed to mandatory tender requirements under section **79** of the act.[49]

83. Further, he argued that the Board undertook "fresh evaluation," hence, it acted in error and beyond its jurisdiction, and ignored the criteria for evaluation. Also, he submitted that it introduced its own parameter, that is, the KEBS Lab Tests contrary to section **80** of the act which provides for evaluation to be done using the procedures and criteria set out in the tender document. He argued that the Review Board encroached on the mandate of the tender evaluation committee[50] *and ignored the provisions of the tender document.*[51]

84. Mr Mate's submission on this issue was that the Review Board acted in excess of its jurisdiction by purporting to conduct fresh evaluations and awarding the tender by itself, maintaining that the Board's powers under section **173** of the act to substitute a decision is restricted to the decisions of the accounting officer of the procuring entity as opposed to the decisions of the procuring entity itself or the evaluation committee. He also argued that the Review Board has no powers to substitute the decision of the procurement entity with its decision, and by substituting the decision, it failed to give effect to provisions of section **3** of the act and Article **227** of the Constitution.

85. It was **Mr. Mate's** argument that the Review Board acted ultra vires *by purporting to interpret and rely on the KEBS reports in absence of an expert opinion, and, that, the powers to interpret the KEBS Reports was a preserve of the Evaluation Committee under section **46 (4) (a)** of the act nor was the test part of the evaluation criteria.*[52]

86. Mr. Kanai's rejoinder was that the KEBS Lab Test Reports were a mandatory requirement under clause **8** of the appendix to Instructions to Tenderers which required all tenderers to submit **2** Kgs of Grade **2** Milled Rice for testing. Further, he argued that clause **3.8** of the General Conditions of Contract gave the second Respondent the right to inspect and or test the goods to confirm their conformity with the contract specification while clause **1** of appendix to Instructions to Tender provided the specification of goods as the supply of Grade **2** Milled Rice and not any other inferior grade. He also argued that the test results were the results of testing the rice samples submitted by each bidder to confirm conformity with the contract specification of the goods as noted by the evaluation committee, a mandatory requirement under Regulation **49(1).** Further, he argued that under Regulation **49(2),** the evaluation committee is required to reject tenders which do not satisfy the technical requirements under Regulation **49 (1).**

87. Mr. Kanai further argued that the Review Board was legally entitled to compare the test results for each tenderer against the tender requirement to confirm that the rice supplied was Grade **2** Milled Rice according to the testing agency. He pointed out that the counsel for the second Respondent was recorded at page **14** of the Review Board's proceedings conceding that the KEBS Lab Test Report was one of the requirements of the tender and that the rice sample failed the lab test. Further, he argued that the Review Board was entitled to examine the test report to establish conformity with the specifications, a mandatory requirement under section **80 (2)** of the act. He also argued that by failing to reject all tenders whose sample failed the test, the second Respondent violated section **80** of the act by awarding the tender to a tenderer whose tender was non-responsive.

88. Mr. Kanai further argued that it is a mandatory requirement under regulation **51(1) (c)** that the evaluation report prepared by the second Respondent must contain the results of the technical evaluation under Regulation **49(1),** thus, underlying the significance of the KEBS Test Reports in determining the responsiveness or otherwise of a bidder hence the Review Board's decision was lawful.

89. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders.[53]Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions.

90. Section **79 (1)** of the Act defines Responsiveness of tenders. It reads that "A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."Section **80** of the Act on evaluation of Tenders provides:-

Evaluation of tenders

80 (1) The evaluation committee appointed by the accounting officer pursuant to *section 46* of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under *section 82(3).*

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) *each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and*

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

91. Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[54] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents, samples and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[55] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.[56]The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

92. To be considered for an award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the bidding system. Non-responsiveness can be defined in terms of the materiality of the nonconformity. A bid that contains "minor informalities" is not considered non-responsive. A minor informality or irregularity, in turn, is defined as: one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The procuring entity can give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the procuring entity.

93. The definition of 'acceptable tender' must be construed against the background of the system envisaged by Article **227** of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective." In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values. This court stresses the need for procuring entities to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.

94. Section **80(2)** of the act provides that "the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents, and, in the tender for professional services, shall have regard to the provisions of the Act and statutory instruments or Regulations. *Regulation **47** provides for* Preliminary evaluation of open tenders as follows:-

47. (1) Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-

(a) the tender has been submitted in the required format;

(b) any tender security submitted is in the required form, amount and validity period;

(c) the tender has been signed by the person lawfully authorised to do so;

(d) the required number of copies of the tender have been submitted;

(e) the tender is valid for the period required;

(f) all required documents and information have been submitted; and

(g) any required samples have been submitted.

(2) The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).

95. Regulation **49(1)** provides that "upon completion of the preliminary evaluation under Regulation **47,** the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document. (2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)." Failure to comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" unless those conditions are immaterial, unreasonable or unconstitutional. As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.

96. It is uncontested that clause **8** of the Appendix to Instructions to Tenderers provide that "firms are required to submit quantity two (2) Kgs of Grade Two (2) Milled Rice to DHQ Logistics. Tenderer must ensure heir samples are delivered on or before the closing date. The samples delivered must be acknowledged in a Sample Register and it is the tenderers duty to ensure that is done. The samples will be taken to KEBS for testing." (Emphasis added).

97. The language of the above provision is clear. It is beyond doubt that the tenderers were required to supply samples for testing and that the testing was to be done by KEBS. The *ex parte* applicant's argument flies on the face of this provision. It lacks substance, it lacks merit and is misguided and dishonest. The *ex parte* applicant's sample was tested as required and did not pass the test. Curiously, the procuring entity supports the view taken by the *ex parte* applicant yet its own documents, namely, the tender documents say otherwise. The procuring entity cannot by any stretch of imagination issue tender documents clearly prescribing the tender requirements and beat an about turn to propagate a position totally different from the express provisions of its tender documents. This court is incapable of condoning such dishonesty.

98. Equally misleading is the argument propounded by the *ex parte* applicant's counsel that the above clause is to be read together with clause **3.8** of "the General Conditions of Contract" which provide that "the procuring entity or its representative shall have the right to inspect and/or to test the goods to confirm their conformity to the contract specification…" In mounting the above argument, the *ex parte* applicant's counsel ignored the truth that the "Appendix to Instructions to Tenderers," as the title suggests, applies at the tendering stage and tenderers must comply with it, while "the General Conditions of Contract" applies to the contract after the tender is awarded. Counsel totally confused the two documents, their purposes and effect and their application. His argument falls on this ground.

99. The requirement for sample testing cannot be said to be immaterial to be ignored or unreasonable nor has any argument been advanced before me to suggest so. This court cannot re-write the tender documents. It can only construe their meaning, purpose and scope. It can only help in determining whether a provision is immaterial or unreasonable.

100. A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid 'validly submitted'. Moreover, the tender process consists of various stages: *first*, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid; *second*, the evaluation of all bids 'validly submitted' as prescribed in the tender documents; and *third*, a decision on which of the validly submitted bids should be accepted. The fact that all bids validly submitted are to be taken into consideration affords no discretion to condone and take into account bids not validly submitted. It follows that the procuring entity had no discretion to condone a bid that did not pass the KEBS Test prescribed in the tender documents. The Review Board was right in refusing to uphold the said illegality. It is clear that the procuring entity has no discretion to condone a failure to comply with the prescribed minimum prerequisites of a valid tender nor can it waive it. It follows that the tender submitted by the *ex parte* applicant having failed the sample test was not an 'acceptable tender' as envisaged by the tender documents or the Act and the Regulations because it did not pass the 'threshold requirement' to allow it to be considered and awarded.

101. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework is a legal requirement. These requirements are not merely internal prescripts that the procuring entity may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in the Fair Administrative Action Act. [57] Deviations from the procedure will be assessed in terms of those norms of the constitutional and statutory requirements, conformity with the Regulations, conformity with tender requirements and compliance with the procedural fairness. Where the administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.

102. One of the primary reasons for the express inclusion of the five principles in Article **227** of the Constitution, and the requirements of a responsive tender and evaluation process in the act and the Regulations is to safeguard the integrity of the government procurement process. The inclusion of the principles, in addition to ensuring the prudent use of public resources, is also aimed at preventing corruption or collusion or both. The crucial point to note is that the *ex parte* applicant's Sample failed the test, a fact that was admitted by the *ex parte* applicant's counsel before the Review Board. In total disregard of its own tender documents, the procuring entity proceeded to award the tender to the *ex parte* applicant. In my view, the Review Board correctly faulted the procuring entity for awarding the tender to the *ex parte* applicant.

103. It is in the public interest that officials comply diligently with regulations and other directives, especially when those directives have in mind the attainment of transparency and accountability and the prevention of corrupt practices. Compliance with the requirements of a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required and it is not open to a state entity to simply disregard these at its whim. To hold otherwise, would undermine the demands of equal treatment, transparency and efficiency under the Constitution and condone violation of the Constitution and the principles laid down in Article **227** of the Constitution and section **3** of the act. These all punctuate the necessity of ensuring that, through the various mechanisms implemented to do so, the imperative of Article **277** of the Constitution and section **3** of the act are met. I find that the impugned decision ground passes this constitutional and statutory imperative. It follows that *ex parte* applicant's argument on this ground fails.

d. Whether the impugned decision is tainted with illegality.

104. It was ***Mr. Ingutya's*** *argument that the impugned decision is tainted with illegality for ordering the third Respondent to be issued with a letter of award within* ***14*** *days in violation of section* ***175*** *of the act.*[58]

105. Mr. Kanai's rejoinder was that the decision required the tender to be awarded within **14** days, hence, it did not limit the *ex parte applicant's right to approach this court. He pointed out that the Britam case cited by* ***Mr. Ingutya*** *is in applicable in the circumstances of this case because the said decision required the procuring entity to award the tender within* ***7*** *days as opposed to the statutory provided period of* ***14*** *days. Hence, he argued, the impugned decision provided the period prescribed by the law, un like in the case cited.*

106. Mr. Mate argued that the powers of the Review Board must be expressly conferred and cannot be a matter of implication,[59] *and, that, a tribunal must act within the four corners of the statute.*[60]

107. As pointed out earlier, the Britam *case cited by the ex parte applicant's counsel has no relevancy to the facts of this case. In the said case, the procuring entity was ordered to award the tender within* ***7*** *days, in clear violation of section* ***175*** *which provides for* ***14*** *days. In the instant case, the Review Board allowed the* ***14*** *days prescribed by the law. I find no illegality. It follows that* ***Mr. Ingutya's*** *and* ***Mr. Mate's*** *argument have no legal basis. I decline the invitation to adopt an argument that flies on the face of the law.*

e. Whether the Review Board took into account irrelevant matters and/or ignored relevant matters.

108. Mr. Ingutya submitted that the Review Board took into consideration irrelevant matters, namely, the KEBS test reports which were not to be used for any other purpose other than the rice supplied had to conform with the contract specifications. He argued that under clause **18** and **19** of the tender document, the KEBS test was not one of the parameters, hence, it was a violation of section **80 (2)** of the act. He argued that the Review Board considered extraneous markings made by an unknown individual on the reports. He also argued that the Board failed consider relevant matters in that it ignored clause **2.27** which requires the procuring entity to undertake post qualification diligence.

109. Mr. Mate *argued that the Review Board failed to consider the Evaluation Committee's Report and analysis on the highest scorer and failed to note that the* ex parte applicant was not only the lowest bidder but also the most responsive, hence, the most successful having passed all the physical and financial evaluations, hence, the decision was unreasonable and irrational.

10. Mr. Kanai's *view was that the decision is not illegal since the Review Board only relied on the second Respondents own evaluation report and the tender document. He argued that it acted in accordance with its powers under sections* ***28 (1)*** *and* ***173*** *of the act. Also, he contended that a review is much wider than an appeal.*[61]*He cited Kenya Pipeline Company Ltd v Hyosung Ebara & Co Limited & Others*[62]which emphasized the powers of a Review Board. He argued that the Review Board was entitled to determine whether the second Respondent adhered to the evaluation criteria contained in the tender document and this extended to determining whether the ex parte *applicant had met the mandatory conditions contained in the tender documents.*

111. Mr. Kanai *also argued that the Review Board only took into account matters it ought to have considered among them KEBS test reports which was a mandatory requirement under clause* ***8*** *of the appendix to instructions to tenderers as provided under Regulation* ***49 (1) (2).*** *He argued that the Review Board did not introduce a condition precedent to the award of the tender since there is a legal requirement that all tenders are subject to technical evaluation, which was a mandatory requirement for the rice to be tested under clause* ***8*** *referred to above.*

112. Counsel also argued that it was the second Respondent who provided the test results and that the ex parte applicant has failed to appreciate that clause **9** applies to physical evaluation and not technical evaluation which is a mandatory evaluation undertaken for a tender to comply with Regulation **49.** Additionally, he argued that the Review Board did not rely on any extrinsic evidence but only relied on the KEBS Test results, and, that, it did not introduce any unknown requirement. He argued that the decision is lawful, rational and in accordance with the criteria contained in the tender document and the law, and, that the Review Board did not fail to consider relevant matters.

113. Reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. It is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking in to account irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable.***[63]***

114. As Cooke J pointed out***[64]***onsiderations may be obligatory (i.e. those which the Act expressly or impliedly requires the Tribunal to take into account), and, permissible considerations (i.e. those which can properly be taken into account), but do not have to be.[65] Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule.

115. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account.[66] In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough.[67] It is suffice to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

116. If, in the exercise of its discretion on a public duty, an authority takes into account considerations which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds: there are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

117. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot* (1983),[68] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the decision maker, not the courts. [69]

118. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment* (1995),[70] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority".[71] His Lordship stated:-

> "Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."

119. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. [72]If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.

120. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters[73] and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision. [74] However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.[75]

121. If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked,[76] even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard. [77] If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?

122. A decision may be invalid (where an irrelevant consideration has been taken into account by a decision-maker. Two issues commonly arise in applying this criterion; one what matters were taken into account by a decision-maker? This is primarily an issue of fact, to be answered by analysis of evidence; and, two, were any of the matters that were taken into account an irrelevant consideration? This is commonly an issue of law, resolved by construction of the statute that confers a power. A criteria of relevance may also be found outside a statute, by reference to other aspects of the legal framework within which decision-making occurs.

123. A court will be **cautious** in deciding that an issue that was taken into account was irrelevant. In the simplest scenario, the legislation will exhaustively list the considerations or factors that can be taken into account. However, more often it will be necessary to draw inferences from other features of the legislation, including; Language of the statute, Purpose or object, The subject matter of the statute, The nature of the power being exercised and The nature of the office held by the decision-maker.

124. The principal focus will always be the words of the statute but other legal assumptions may be taken into account by the court, such as: A general legal presumption that legislation can never be administered to advance the personal interests of the decision-maker. Serious factual errors may be equated with irrelevant considerations. A conclusion that a particular matter was considered can often be drawn from such evidence as:-A statement of reasons; Contemporaneous administrative decisions; Reliance by the decision maker upon an irrelevant policy statement etc.

125. The core issue is whether *the KEBS reports were irrelevant considerations. A reading of the relevant provisions of the act, the Regulations and the Tender Documents leaves me with no doubt that the KEBS testing was a mandatory requirement, hence, a relevant consideration. To hold otherwise would be an affront to the same provisions of the law that this court is required to hoist high.* I find backing in the provisions of section **28 (1) and 173** of the act.

126. Section **28(1)** of the act provides the functions and powers of the Review Board in the following words-The functions of the Review Board shall be—(a) reviewing, hearing and determining tendering and asset disposal disputes; and (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

127. The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.[78] The law remains, as I see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and, so long as it acts in good faith (and reasonably and rationally), a court of law cannot interfere.

128. At common law, errors of law must go to jurisdiction except in the case of applications under the writ of *certiorari*, which covers non-jurisdictional errors of law on the face of the record. A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different. [79]There is no error of law in making a wrong finding of fact.[80]

129. On review, if a court finds that a decision has been made unlawfully, the powers of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law.[81] It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to Judicial Review. Conversely, there may be situations where a decision is the correct or preferable one, but may be set aside because it is subject to legal error.

130. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a Judicial Review court does not function as an appellate court. Besides, the purpose of Judicial Review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial Review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.[82]

131. A reading of the material presented before the Review Board, and in particular the tender documents, the act, the Regulations and Judicial pronouncements on the matter leaves me with no doubt that the samples and KEBS Testing were mandatory requirements, hence, relevant matters. In fact, the reverse is correct, that is, had the Review Board failed to consider the KEBS Test Reports, it would have been guilty of unreasonableness and ignoring relevant considerations.

Conclusion and final determination.

132. Section **173** of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any 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* ***(d)*** *order termination of the procurement process and commencement of a new procurement process.* This section has been the subject of determination in numerous cases in this Country.

133. Discussing a similar provisions in The Public Procurement and Disposal Act,[83] which was repealed by the current act, the Court of Appeal in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd*.[84]

> "The Review Board is a specialized statutory tribunal established to deal with all complains 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 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 procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."

134. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. It is not disputed that the Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved that the Respondent acted outside its powers or the decision was arrived at after taking into account irrelevant or extraneous matters. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

135. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon it and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. *No illegality, irrationality or procedural impropriety has been established in the manner in which the Board approached and determined the issues before it.* An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

136. Judicial review is not the re-hearing of the merits of a particular case. Rather, it is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. Judicial Review is a more limited right than a right of appeal. The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested

in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.[85]

137. Judicial Review is concerned with testing the legality of the administrative decisions. A classic statement of the scope and nature of Judicial Review is to be found in the judgment of Brennan J who eloquently stated "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government…The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error."[86]

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

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

140. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy, especially where there are circumstances which disentitle a party to benefit from court's discretion.

141. I am not persuaded that the *ex parte* applicant has demonstrated any of the grounds for grant of Judicial Review, namely, **illegality, irrationality** or **procedural impropriety.** The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where the above grounds have been proved.

142. In view of my analysis of the issues discussed herein above and the conclusions, I find and hold that the *ex parte* applicant has not demonstrated any grounds for this court to grant the Judicial Review orders sought. Accordingly, I dismiss the *ex parte* Applicant's Application dated **3rd** August 2018 with costs to the first and third Respondent.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 11th day of December, 2018

John M. Mativo

Judge

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[1] JR No. 74 of 2018.

[2] Article 227 of the Constitution.

[3] Act No. 33 of 2015.

[4] Act No. 4 of 2015.

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

[6]*R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587.

[7] Ibid.

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

[9] See J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

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

[11] Citing *Hadkinson v Hadkinson* {1952}2 ALL ER 567, *Dorothy K. Kwonyike t/a Luguyan Enterprises vs B=Victoria Commercial Bank*

Ltd {2000}eKLR and *Ali Gadaffi Hamissi & 2 Others Francis Muhia Mutungu & 2 Others* {2015}eKLR.

[12] Act No. 4 of 2015.

[13] See ***Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another*** **[2005] 1 KLR 828** ***Ibrahim, J*** (as he then was)

[14] See ***Awadh vs. Marumbu*** **(No 2) No. 53 of 2004 [2004] KLR 458,**

[15] See **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431**

[16] S v Beyers **1968 (3) SA 70** (A).

[17] *S v Mamabolo* **[2001] ZACC 17**; **2001 (3) SA 409** (CC) para 14, per Kriegler J, on behalf of the court (where contempt of court in the form of scandalising the court was in issue).

[18] Per Sachs J in *Coetzee v Government of the Republic of South Africa* **[1995] ZACC 7**; **1995 (4) SA 631** (CC) para 61, quoted and endorsed by the court in *Mamabolo* (above). In *Coetzee*, statutory procedures for committal of non-paying judgment debtors to prison for up to 90 days – which the statute classified as contempt of court – were held unconstitutional.

[19] *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co* Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367H-I; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602(SCA) paras 18 and 19.

[20]Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 (C) 524D, applied in Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 691C.

[21] Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 692E-G per Botha J, rejecting the contrary view on this point expressed Consolidated Fish v Zive (above). This court referred to Botha J's approach with seeming approval in Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 368C-D.

[22] See the formulation in *S v Beyers* **1968 (3) SA 70** (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 ('Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[23]Burchell v. Burchell, Case No 364/2005

[24] {2016} eKLR.

[25] Ibid

[26] Ibid

[27]{1952} 2 All ER 567.

[28] CA No. 304 of 2006 (171/2006 UR).

[29]In *Burchell v. Burchell* Case No 364/2005.

[30]{1952} P 285.

[31] *Bayer AG v Winter and others*[1986] 1 All ER 733.

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

[33] Counsel cited *Republic vs Public Procurement Administrative Review Board and 4 Others ex parte Britam Life Assurance Company (K) Ltd & Another* {2018}eKLR.

[34] Citing *Bugerere Sugar Factory Limited vs Sebaduka* {1970} E.A. 147 and *Leo Investments Ltd v Trident Insurance Company Limited* [2014] eKLR

[35] Cap 2, Laws of Kenya.

[36] Supra.

[37] {2014}eKLR.

[38]SCCA No 1 of 1998.

[39] {2014}eKLR.

[40] MANU/SC/0047/1967.

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

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

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

[44] Ibid.

[45] Ibid.

[46] Act No. 4 of 2015.

[47] Ibid.

[48] Ibid.

[49] Citing Counsel cited *Republic vs Public Procurement Administrative Review Board and 4 Others ex parte Britam Life Assurance Company (K) Ltd & Another* {2018}eKLR.

[50] Citing Citing Counsel cited *Republic vs Public Procurement Administrative Review Board and 4 Others ex parte Britam Life Assurance Company (K) Ltd & Another* {2018}eKLR.

[51] Citing *Republic vs Public Procurement Water Review Board & 2 Others ex parte Coast Water Services Board & Another* {2016]eKLR.

[52] Citing section 85 of the Act.

[53] The term "procuring entities" is used here to refer broadly to government or public entities and specifically those entities that are bound by the procurement clause in Article 227 of the Constitution and by relevant procurement laws.

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

[55] Hoexter 2012: 295.

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

[57] Act No 4 of 2015.

[58] Citing Counsel cited *Republic vs Public Procurement Administrative Review Board and 4 Others ex parte Britam Life Assurance Company (K) Ltd & Another* {2018}eKLR.

[59] Citing *Kenya Power and Lighting Company Limited v The Public Procurement Administrative Review Board*, JR No. 302 of 2016.

[60] Citing *Republic v Kenya Revenue Authority ex parte Aberdatre Freight Services Ltd & 2 Others* {2004} 2 KLR 530.

[61] Citing *Republic v Procurement Administrative Review Board & 2 Others ex parte Coast Water Services Board & Another* {2016}eKLR.

[62] {2012}eKLR.

[63] As stated in the case *R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd* {1987} 1 WLR 1166.

[64]In the case *Ashby v. Minister of Immigration {1981} 1 NZLR 222 at 224.*

[65] See Wade & Forsyth, p.381.

[66] See *Cannock Chase DC v Kelly* [1978] 1 All ER 152.

[67] *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941

[68] *R. v. Boundary Commission for England, ex parte Foot* [1983] EWCA Civ 10, [1983] Q.B. 600, C.A. (England and Wales).

[69] Ibid.

[70] *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] UKHL 22, [1995] 1 W.L.R. 759, H.L. (UK).

[71] Ibid.

[72] These three considerations were set out by Simon Brown L.J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037, at 1049.

[73] *R. v London (Bishop)* (1890) 24 Q.B.D. 213 at 226–227 (affd. on grounds not identical, sub nom. *Allcroft v Bishop of London* [1891] A.C. 666); *Ex p. Rice; Re Hawkins* (1957) 74 W.N. (N.S.W) 7, 14; *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020; Re Hurle-Hobbs' Decision [1944] 1 All E.R. 249

[74] *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 271; *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 at 1449–1450 (Lawton L.J.); *Asher v Secretary of State for the Environment* [1974] Ch. 208 at 221, 227.

[75] *Marshall v Blackpool Corp* [1935) A.C. 16; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1992] 2 All E.R. 761.

[76] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.

[77] On mandatory and directory considerations, see 5–049; e.g. *Yorkshire Copper Works Ltd v Registrar of Trade Marks* [1954] 1 W.L.R. 554 (HL held that the Registrar was bound to have regard to specific factors to which he was prima facie empowered to have regard); *R. v Shadow Education Committee of Greenwich BC Ex p. Governors of John Ball Primary School* (1989) 88 L.G.R. 589 (failure to have regard to parental preferences).

[78] Lawrence Baxter Administrative Law 1ed (1984) at 505.

[79] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.

[80] *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

[81] *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578-579, 598-600.

[82] See **Githua J** in ***Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited*** **Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR.**

[83] Act No. 3 of 2005.

[84]{2012} eKLR.

[85] As noted by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, {1986} 162 CLR 24, 40-41 citing *Wednesbury Corporation* [1948] 1 KB, 228.

[86]In *Attorney-General (NSW) v Quin* {1990} 170 CLR 1, 35 – 36.